Supreme Court, U.S.
FILED
MAR 22 2000
OFFICE OF THE CLERK

No. 99-991560

IN THE
Supreme Court of the United States

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, INDIVIDUALLY AND AS TRUSTEE OF THE JASON GROSFELD TRUST, MULTIVEST REAL ESTATE, INC., S.S. MELBOURNE, INC., AND THE CYPRESS GROUP, INC.,

Petitioners,

v.

WILLIAM WATERS AND LINDA BARTHOLOMEW, INDIVIDUALLY AND ON BEHALF OF ALL THOSE SIMILARLY SITUATED,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PAUL M. DODYK
Counsel of Record

CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
Telephone: (212) 474-1000
Facsimile: (212) 474-3700

R. Lawrence Bonner
HOMER, BONNER & DELGADO, P.A.
100 S.E. Second Street
Miami, FL 33131
Telephone: (305) 350-5100
Facsimile: (305) 379-0918

Martin I. Kaminsky
POLLACK & KAMINSKY
114 West 47th Street
New York, NY 10036
Telephone: (212) 575-4700
Facsimile: (212) 575-6560

Attorneys for Petitioners

March 22, 2000

36pp

QUESTIONS PRESENTED

What standard should govern the relationship between the fees paid to plaintiffs' class counsel and the distributions actually made in class actions for money damages in tort cases?

Whether the Circuit Court erred in affirming the District Court's award under Fed. R. Civ. P. 23 of a fee to plaintiffs' counsel of $13,333,333 in a commodities class action case where the total distribution to the class is only $6,485,362.15?

Whether federal courts may disregard the amount distributed to the plaintiff class in awarding fees to class counsel?

Whether the Circuit Court erred in refusing to exercise its supervisory authority over the District Court by its unqualified endorsement of the District Court's discretion to award whatever counsel's fee it chooses in a tort class action, despite the fact that:

- the Fee Award ($13,333,333) was more than 200% of the amount actually distributed to the class ($6,485,362.15);
- the Fee Award was more than 400% of the highest fee ever awarded by any district court in the Eleventh Circuit, relative to the actual class distribution;
- the Fee Award was more than 400% of the average fee awards in securities actions in the federal courts, which range between 42.2% and 48.5% in the twelve federal circuits; and
- the Private Securities Litigation Reform Act requires that total attorneys' fees and expenses not exceed "a reasonable percentage of the amount of any damages and prejudgment interest *actually paid* to the class"? 15 U.S.C. 77z-1(a)(6)

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT IN ACCORDANCE WITH RULE 29.6 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

The petitioners are International Precious Metals Corporation, MultiVest, Inc., James Grosfeld, individually and as trustee of the Jason Grosfeld Trust, MultiVest Real Estate, Inc., S.S. Melbourne, Inc., and the Cypress Group, Inc., who were defendants-appellants below and shall be referred to as "petitioners" or "defendants" throughout this petition. None of the corporations named as petitioners are owned either by parent corporations, or by publicly held companies owning 10% or more of that corporation's stock.

The respondents are William Waters and Linda Bartholomew, individually and on behalf of all those similarly situated, who were plaintiffs-appellees below and shall be referred to as "respondents" or "plaintiffs" throughout this petition.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
PETITION FOR WRIT OF CERTIORARI	1
CITATION TO OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
Background	3
The Case Below	3
The Scheme	8
Reversionary and Pro Rata Settlements	13
REASONS FOR GRANTING THE WRIT	18
I. The Court should grant certiorari to resolve a conflict between the Eleventh Circuit and other Federal Courts in the standards applicable to the determination of class counsel fees	18
II. This Court should grant certiorari to put an end to plaintiffs' counsel's manipulation of reversionary settlements to enrich themselves at the expense of their class clients	24
III. This Court should not allow plaintiffs' counsel to deprive defendants of appellate review	26
CONCLUSION	30

TABLE OF AUTHORITIES

Cases	Page(s)
Ashley v. Atlantic Richfield Co., 794 F.2d 128 (3d Cir. 1986)	11
Boeing Co. v. Van Gemert, 444 U.S. 472 (1980)	19, 21
Bowling v. Pfizer, Inc., 927 F. Supp. 1036 (S.D. Ohio 1996)	22
Bussie v. Allmerica Financial Corp., 1999 WL 342042 (D.Mass. 1999)	23
Duhaime v. John Hancock Mut. Life Ins. Co., 989 F. Supp. 375 (D.Mass. 1997)	22
Evans v. Jeff D., 475 U.S. 717 (1986)	4
Goodrich v. E.F. Hutton Group, Inc., No. 8279, 1996 WL 76161 (Del. Ch. 1996)	22
In re Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297 (N.D. Ga. 1993)	23
In re G.M.C. Pick-up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768 (3d Cir. 1995)	4
In re Prudential Ins. Co. of Am. Sales Practices Litig., 962 F. Supp. 572, (D.N.J. 1997)	22
In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995)	11
Lyons v. Scitex Corp., 987 F. Supp. 271 (S.D.N.Y. 1997)	13

	Page(s)
Malchman v. Davis, 761 F.2d 893 (2d Cir. 1985)	11, 28
Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977)	11
Strong v. BellSouth Telecomm. Inc., 137 F.3d 844 (5th Cir. 1998)	18, 20, 22
Weinberger v. Great Northern Nekoosa Corp., 925 F.2d 518 (1st Cir. 1991)	11, 27
Williams v. MGM-Pathe Comm. Co., 129 F.3d 1026 (9th Cir. 1997)	18, 19, 20
Wise v. Popoff, 835 F. Supp. 977 (E.D. Mich. 1993)	22
Statutes and Rules	
15 U.S.C. § 77z-1(a)(6)	i, 3, 3, 24
28 U.S.C. § 1254(1)	2
Fed. R. Civ. P. 23	4, 12, 27

No. 99-

IN THE

Supreme Court of the United States

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, INDIVIDUALLY AND AS TRUSTEE OF THE JASON GROSFELD TRUST, MULTIVEST REAL ESTATE, INC., S.S. MELBOURNE, INC., AND THE CYPRESS GROUP, INC.,

Petitioners,

v.

WILLIAM WATERS AND LINDA BARTHOLOMEW, INDIVIDUALLY AND ON BEHALF OF ALL THOSE SIMILARLY SITUATED,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners, International Precious Metals Corporation, MultiVest, Inc., James Grosfeld, individually and as trustee of the Jason Grosfeld Trust, MultiVest Real Estate, Inc., S.S. Melbourne, Inc., and the Cypress Group, Inc., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on September 30, 1999.

CITATION TO OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 190 F.3d 1291 (11th Cir. 1999) and annexed hereto as Appendix A.

This Decision affirmed the Final Order and Judgment Approving Settlement of the United States District Court for the Southern District of Florida entered on April 2, 1997, as amended by the Amendment to Final Order and Judgment Approving Settlement entered on May 8, 1997 and the final order of the Court dated May 8, 1997 denying Defendants' motion pursuant to Fed. R. Civ. P. 52(b) and 59(e). These final orders and judgments of the District Court are not officially reported but are annexed hereto as Appendices C, D and S respectively.[1]

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on September 30, 1999. Petitioners' petition to the Court of Appeals for the Eleventh Circuit for rehearing with suggestion for rehearing *en banc* was denied on December 23, 1999; that order is annexed hereto as Appendix F. This petition is timely filed within ninety days of the denial of the petition for rehearing and suggestion for rehearing *en banc*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The question presented in this case is whether federal courts may disregard the amount actually distributed to the plaintiff class when awarding fees to class counsel. An answer to that question has been provided by the Congress in the Private Securities Litigation Reform Act of 1995, which states in relevant part:

> "Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and

---

[1] Citations to the portions of the proceedings below which have been included in the Appendix submitted herewith are cited as "App. ___ at p. ___."

prejudgment interest actually paid to the class." 15 U.S.C. § 77z-1(a)(6).

STATEMENT OF THE CASE

Background

This case is an example of a scheme plaguing the federal courts which is currently being practiced by class action counsel to enrich themselves. The essence of the scheme involves the manipulation of class action settlements to produce attorneys' fees far greater than class distributions. In this case, plaintiffs' counsel's implementation of the scheme resulted in a fee which was more than 200% of the amount actually distributed to the class. This scheme injures the interests of class plaintiffs, discredits the legal profession and the courts and diverts hundreds of millions of dollars to plaintiffs' class counsel. It permits class counsel to obtain exorbitant fee awards which undermine public confidence in the legal profession and the courts. Although this scheme has been widely implemented in connection with settlements which occur in most tort class actions, it has never before been exposed to the light of judicial scrutiny because class counsel customarily silence the class and defendants. For reasons which appear below, defendants are exposing this scheme to the scrutiny of this Court for the first time.

The Case Below

Petitioners seek review of the Eleventh Circuit's affirmance of a district court's Fee Award under Fed. R. Civ. P. 23 of plaintiffs' counsel fees of $13,333,333 in this commodities class action where only $6,485,362.15 will be distributed to the class. *The District Court's Fee Award is over 200% of the actual class distribution.* Prior to the decision below, no district court in the Eleventh Circuit had ever awarded a plaintiff's counsel's fee in excess of 50% of the

actual class distribution in a securities class action.[2] The District Court's Fee Award is, therefore, more than 400% of the highest fee ever awarded in any comparable case in the Eleventh Circuit relative to the actual class distribution. Average attorneys' fees awarded in securities class actions under Fed. R. Civ. P. 23 vary from 42.2% to 48.5% of class distributions in the twelve federal circuits.[3] The Fee Award in this case is, therefore, inconsistent with past precedent in comparable cases throughout the country. The results in this case are, however, symptomatic of the exorbitant fees being awarded in cases where the plaintiff class is awarded noncash compensation, such as discount coupons, which are difficult to value, and class counsel receives hard cash. *See, e.g., In re G.M.C. Pick-up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 803 (3d Cir. 1995).

In affirming, the Eleventh Circuit refused to discharge its supervisory responsibilities over the District Court's Fee Award, as required by this Court in *Evans v. Jeff D.*, 475 U.S. 717, 726 (1986). The Circuit Court simply held that district courts have the discretion to set whatever fee they choose in class actions, *irrespective of the fee's relation to the amount of the actual class distribution.* The Court of Appeals' opinion completely failed to address the grotesque disparity between the District Court's fee award, at 200% of the actual class distribution, and the prior decisions in the Eleventh Circuit, where no court has ever awarded a fee in excess of 50% of the

---

[2] Statistics concerning the relationship between attorneys' fees and class action distributions set forth in this petition are drawn from a study by the National Economic Research Associates ("NERA Study") upon which the District Court below relied. Excerpts from the study are reproduced in Appendices J and K. *See also* App. M (Aff. of Michael R. Siebecker, executed April 21, 1997 ("4/21/97 Siebecker Aff.")) at pp. M-4, ¶ 12; and M-6, ¶ 15.

[3] *See* NERA Study, Table 12b ("Table 12b"), App. K. The NERA Study states fees as a percentage of the sum of fees and class compensation. For purposes of this petition, fees are expressed as a percentage of class compensation. *See* App. M (4/21/97 Siebecker Aff.) at p. M-6, ¶ 15.

actual class distribution in any comparable case, or any other circuit, where the average fees awarded range between 42.2% and 48.5% of the settlement amounts.[4]

To make matters worse, this extraordinary fee was awarded in what was essentially a churning case—plaintiffs alleged that defendants had "solicit[ed] and stimulat[ed] excessive trading" (190 F.3d at 1292; App. A at p. A-2)—despite the fact that no federal court has ever certified such a class action because churning cases inevitably involve individual oral communications which are not suitable for class disposition. In this case, plaintiffs alleged that the 800+ brokers of MultiVest Options, Inc. ("MOI") had solicited and stimulated excessive trading in commodity options. The purported class consisted of 20,600 MOI customers who had traded commodity options over a five year period from June 1985 to October 1989. These options were freely traded on national commodities exchanges. The options were sold at their market-determined prices. Every customer authorized each and every trade. There was no allegation that the options were not as represented or in any way fraudulent. Plaintiffs' sole allegation was that all 20,600 of them had been induced to trade too often by their brokers.

Plaintiffs sought to recover the entire amount of all their losses from knowingly trading high-risk commodity options over the five year period, which were alleged to be $120,000,000. The case was settled in 1997 for approximately $6,500,000 in cash and notes to the class.[5]

---

[4] *See* App. K (Table 12b); and App. M (4/21/97 Siebecker Aff.) at pp. M-4, ¶ 12; and M-6, ¶ 15.

[5] An appeal is currently pending in the Eleventh Circuit involving an attempt by plaintiffs' counsel to qualify certain additional late-filing or non-filing claimants, despite their disqualification under the Stipulation of Settlement. (99-4225-EE; *see* App. G) If plaintiffs were successful on that appeal, an addition of approximately $1,960,000 would become payable to the class, an amount insufficient to change the issues raised by the District Court's exorbitant Fee Award.

The District Court based its award of attorneys' fees to class counsel on its view that this was a "well-conceived class action".[6] Despite the importance of the certifiability question to any reasoned appellate assessment of the Fee Award, the Circuit Court chose not to address that or any other issue related to plaintiffs' conduct of the litigation below: "The merits of the underlying class action, notwithstanding the energy devoted to those topics by counsel, are not at issue in this appeal". (190 F.3d at 1292 n.1; App. A at p. A-2 n.1)

This Court is therefore confronted with a Fee Award which is more than four times the awards granted by the federal courts in comparable prior cases and double the actual class distribution, to which the Eleventh Circuit has refused to give substantive review. As a result, this case raises before this Court the question whether federal circuit courts are obliged to give substantive review to the justifiability of fee awards to class counsel which are larger than the actual distributions made to the class of plaintiffs they ostensibly represent, and vastly larger than the fees awarded to counsel in other comparable cases; or whether the circuit courts may simply say that whatever the district courts decide is within their unbridled discretion.

This case raises the issue of what standard should govern the relationship between attorneys' fees and actual class distributions in class actions seeking money damages in tort cases—a question which has never been addressed by this Court. Petitioners argue below that the federal courts should adopt a standard which limits plaintiffs' counsel fees in a tort class action for money damages to *a reasonable percentage of the actual distribution to the class because plaintiffs are responsible for that distribution.*[7]

---

[6] Petitioners cite to their brief on appeal which appears at Appendix W hereto (hereinafter "DB App."); *see* DB App. at pp. W-4; and W-41.

[7] *See* pp. 18-26 below.

The only feature of the proceedings below to which the Circuit Court adverted in blessing the District Court's discretion is the fact that plaintiffs' counsel's claimed investment of time, or "lodestar", approximated the Fee Award.[8] That factor cannot logically justify the District Court's extraordinary Fee Award without some substantive analysis of whether plaintiffs' counsel was justified in expending such efforts.

The record below established, without contradiction, that this case was prolonged by plaintiffs' counsel's adamant insistence upon a settlement of at least $90,000,000, up to the day of closing arguments, to settle a case in which the total alleged investment loss was only $120,000,000.[9] Since such securities or commodities class actions are almost always settled for 5 to 10% of the claimed investment loss, plaintiffs' counsel's refusal to negotiate in good faith prolonged this litigation for seven years. Plaintiffs' counsel's irresponsibility in pursuing that course of action was revealed by the fact that they then settled the case on the eve of closing arguments for a $6,500,000 distribution to the class, so that they could seek a fee of $13,333,333. They did so shortly after the District Court expressed its growing doubts, after five months of trial, that they had proven their case:[10] "I don't think that the weight of the evidence is necessarily in the plaintiffs' favor on the pervasiveness of these things." (R120-1433 at 7843) As plaintiffs' counsel, themselves, admitted, they had become concerned over the prospect of a "defense verdict" or "hung jury" (R126-1442 at 8280, 8294) and concluded: ". . . it's possible two weeks from now we'll have nothing for them . . . ." (R126-1442 at 8298)

Plaintiffs' counsel's exorbitant fee reduced the amount distributed to the class because the amounts paid to class

---

[8] 190 F.3d at 1298; App. A at p. A-13.

[9] DB App. at pp. W-20; W-42; and W-55.

[10] *See* DB App. at p. W-27.

counsel were deducted in the process of determining the actual class distribution. Had plaintiffs' counsel received a fee consistent with past precedent, the distribution to the class would have increased by approximately $1,000,000, or 15%.[11]

So plaintiffs' counsel decided to settle a case which they had forced through seven years of litigation and five months of trial for a class payment of $6,500,000 so that they could seek an exorbitant fee through manipulation of a "reversionary" settlement, which is described below. In approving the District Court's Fee Award, the Circuit Court refused to address the proceedings below. Without such a review, it was not possible for the Court of Appeals to make a reasoned judgment whether the Fee Award could be justified by reference to the time expended by counsel. At a bare minimum, the Circuit Court should have made its own determination whether the case involved a properly certifiable class. Since the District Court based its Fee Award on its view that this case was a "well-conceived class action", there could be no reasoned appellate review of the Fee Award without some examination of the District Court's major premise.

The Scheme

The result below is symptomatic of a rapidly growing practice by plaintiffs' class counsel of betraying the interests of their class plaintiffs to secure exorbitant fees in federal courts. The scheme is typically implemented in cases involving noncash compensation to the class. There are six principal elements to the scheme now plaguing the federal courts.

---

[11] DB App. at pp. W-42; W-44; and W-51. The Circuit Court sought to minimize the effect of the exorbitant fee on the plaintiffs by claiming that the $1,000,000 would be divided among the 20,600 class members. (190 F.3d at 1298 n.12; App. A at p. A-13 n.12) In fact, the $1,000,000 would have been received by the 5,000 qualifying claimants, and would have increased their recovery by approximately $200 over their average $1,300 payout. The balance would revert to defendants.

First, class counsel negotiates a *"reversionary"* settlement, involving a nominally large gross "settlement fund", *little of which goes to the plaintiff class and most of which reverts to defendants.*[12] This case involved a gross "settlement fund" of $40,000,000, of which approximately $6,500,000 went to the class; approximately $15,700,000 went to class counsel (fees and expenses) and approximately $17,800,000 "reverted" to defendants.

Second, plaintiffs' class counsel seeks an exorbitant fee *based on the purely nominal gross amount of this reversionary settlement fund,* even though experienced securities counsel, such as the plaintiffs' lawyers and the district court judge below, know that only a small fraction of that fund will be paid out. That is because only a minority of class members file claims, and an even smaller minority file qualifying claims in a securities or commodities class action. In this case, plaintiffs' counsel requested a fee of $13,333,333 or ⅓ of the purely nominal gross settlement fund of $40,000,000, even though they knew that only a minority of the class members would file claims and receive distributions. In fact, 6,600 members of a class of 20,600 filed claims and approximately 5,000 qualified for distributions.[13] The gross "settlement fund" of $40,000,000 resulted in an actual class distribution of approximately $6,500,000, or about 16% of the gross fund.

Third, plaintiffs' class counsel prepares and distributes incomplete and misleading class notices, which do not disclose that the Fee Award sought will be greater than the actual class distribution.[14] In this case, plaintiffs' counsel admittedly knew that only a small fraction of class members would file

---

[12] See below at pp. 13-16 for a more detailed description of "reversionary" and "pro rata" settlements.

[13] DB App. at p. W-29.

[14] *See* Apps. H ([Draft] "Notice of Proposed Settlement of Class Action, Settlement Hearing and Right to Appear"); and I ([Draft] "Summary Notice").

qualifying claims and that the actual class distribution would be far less than the fee requested. However, plaintiffs' counsel concealed the fact that their disclosed fee request of $13,333,333 was more than twice the expected actual class distribution. Had they disclosed that fact, there would doubtless have been many objections. By these means, plaintiffs' counsel stifle any objection to their exorbitant fee requests by their clients.

Fourth, plaintiffs' class counsel files a misleading fee application. In this case, plaintiffs' fee application described the settlement as "historic", "truly unprecedented" and "nothing short of spectacular".[15] It was not. The plaintiff class recovered about 5.4% of its alleged aggregate investment loss (*i.e.*, $6,500,000 of $120,000,000)—an amount typical in the settlement of such cases.

Even more seriously, the fee application falsely asserted that there would be a "$40,000,000 *recovery*" and compared that $40,000,000 "recovery" to actual class distributions in other cases,[16] even though plaintiffs' counsel knew but did not disclose that the actual class distribution would be a minor fraction of the $40,000,000 gross "settlement fund" (*i.e.*, approximately $6,500,000).

Fifth, all reversionary settlements, including this one, involve rigorous qualification procedures requiring class members to submit proofs of claim and supporting documentation. The plaintiff class is substantially unrepresented in these negotiations. Plaintiffs' counsel is primarily concerned with their own self-enrichment, while defendants' counsel is obligated to minimize the cost of the settlement to their clients. Plaintiffs' counsel seek to maximize their fee; defendants' counsel seek to maximize defendants' reversion. In this case, all parties including the District Court

---

[15] *See* DB App. at pp. W-37; and W-59.

[16] *See* DB App. at pp. W-36; and W-37.

understood that the rigorous qualifying procedures would reduce the actual class distribution.

Sixth, plaintiffs' counsel customarily seek to silence defendants' counsel by demanding that defendants' counsel either: (1) agree to some prearranged fee; or (2) agree not to oppose plaintiffs' fee application.[17] Defendants often have no alternative but to accept such arrangements. As Judge Posner of the Seventh Circuit, quoting Judge Friendly, observed: "[S]ettlements induced by a small probability of an immense judgment in a class action" may result in "blackmail settlements". *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

Having silenced the class through a misleadingly incomplete class notice, plaintiffs' counsel seek to eliminate the only surviving remnant of the adversary procedure by silencing the defendants. The effectiveness of plaintiffs' counsel's efforts to eliminate the adversary process explains why this Court has not had the opportunity to establish a standard relating counsel fees to actual class distributions, despite the prevalence of these practices in the federal courts. Class counsel's fee applications are rarely contested in the district courts and even more rarely appealed.

In this case, defendants were confronted with a peremptory demand for such an agreement. Defendants did *not* agree to plaintiffs' counsel's fee. Although defendants were concerned about the injection of fee issues by plaintiffs' counsel at a time when the parties were negotiating the class distribution,[18] they

---

[17] Such agreements have been condemned as unenforceable. *See, e.g., Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 524-25 (1st Cir. 1991); *Malchman v. Davis*, 761 F.2d 893, 907-908 (2d Cir. 1985) (Newman J., concurring).

[18] Federal courts have condemned plaintiffs' counsel's injection of fee issues before the class distribution has been agreed. *See, e.g., Prandini v. National Tea Co.*, 557 F.2d 1015, 1021 (3d Cir. 1977); *Ashley v. Atlantic Richfield Co.*, 794 F.2d 128, 137-38 (3d Cir. 1986).

had no choice but to agree not to directly or indirectly oppose plaintiffs' counsel's fee application.[19] In doing so, defendants relied on the District Court's obligation to set the fee under Fed. R. Civ. P. 23 in accordance with past precedent—a reliance which proved unjustified, as the District Court set a fee which was more than four times the highest fee ever awarded by any comparable case in the Eleventh Circuit and more than double the actual class distribution.

Defendants agreed not to directly or indirectly oppose plaintiffs' fee application. At no time prior to the District Court's Fee Award did defendants make any argument to the Court concerning what fee should be awarded. Confronted by plaintiffs' counsel's falsehoods asserting that this case involved a "$40,000,000 recovery" and justifying their fee by comparing that purely nominal "$40,000,000 recovery" to actual distributions in other cases, defendants limited themselves to pointing out that the $40,000,000 settlement fund in this class did not represent an actual distribution and that plaintiffs' comparison of that figure to actual distributions in other cases was seriously misleading.[20]

These machinations by plaintiffs' counsel in class actions—claiming exorbitant fees based on the purely nominal gross settlement funds in reversionary settlements, submitting misleading fee applications, and suppressing the adversary process by issuing misleading notices and silencing defendants—have resulted in the growth of exorbitant plaintiffs' counsel's fees, far in excess of any benefit actually conferred upon the class. Such abuses have led the Congress to limit fees in class actions to a "reasonable percentage" of the damages "actually paid" to the class in the Private Securities Litigation Reform Act ("PSLRA"). 15 U.S.C. § 77z-1(a)(6). In affirming the decision below, the Eleventh Circuit refused to

---

[19] *See* App. G (Stipulation of Settlement, dated January 17, 1997) at p. G-36; *see also* DB App. at pp. W-43; and W-59.

[20] *See* DB App. at pp. W-36; W-37; and W-59.

consider the policies underlying the PSLRA without offering any rationale whatsoever. (190 F.3d at 1297 n.11; App. A at p. A-12) *But see Lyons v. Scitex Corp.*, 987 F. Supp. 271, 273-74 (S.D.N.Y. 1997) (applying the policy of the PSLRA to an action commenced before its effective date).

This abuse of the legal process by plaintiffs' counsel more commonly involves noncash discount coupons for the class, which are difficult to value, and hard cash for the lawyers. Because of the difficulty of valuing such coupons, few of which are actually used by class members, the disparity between attorneys' fees and actual class recovery is obscured. *See, e.g., In re G.M.C. Pick-up Truck Fuel Tank Products Liability Litigation*, 55 F.3d at 803. In this case, there is no question that plaintiffs' counsel's fee of $13,333,333 far exceeds the value of the class distribution of approximately $6,500,000.

Plaintiffs' counsel's application for fees is generally unopposed because the class is unaware that their lawyers will be getting more than they are and defendants are blackmailed into silence. District courts, under enormous time pressures, and deprived of adversary presentation, sanction the fees requested without fully informed exploration—a fact which makes the Eleventh Circuit's refusal to address the problems inherent in the grotesquely disparate Fee Award in this case all the more troubling.

Reversionary and Pro Rata Settlements

The only reason that the Fee Award in this case was so much higher than fees awarded in comparable cases is that this was a "reversionary" and not a "pro rata" settlement and the District Court awarded 33⅓% of the gross "settlement fund", *most of which was not actually distributed to the class*. In a "pro rata" settlement, the entire gross settlement fund, after payment of counsel's fees and expenses, is distributed to the plaintiff class. Thus, in a pro rata settlement fund, the entire gross settlement fund is paid out. First, attorneys' fees and expenses are paid. Then, the entire remaining balance is paid

to qualifying claimants. For example, if fees and expenses are 33% of the gross settlement fund, the other 67% is paid out to the class.

In a "reversionary" settlement, the gross settlement fund is *not paid out*. First, attorneys' fees and expenses are paid out. Next, class members who file qualifying claims receive only a limited amount based on the assumption—which is a fiction—that 100% of the class will file qualifying claims. Since only 25% of class members typically file qualifying claims, 25% of the settlement fund, after deduction of fees and expenses, is paid to class members and the remaining 75% reverts to defendants. In this case, involving a reversionary settlement, $6,500,000 was paid out to the class, $15,700,000 was paid to plaintiffs' class counsel in fees and expenses and $17,800,000 reverted to defendants. If, for example, 33% is paid to counsel in a reversionary settlement, qualifying class members will receive about 17% and about 50% will revert to defendants. That means that the actual class distribution from a reversionary settlement fund will be a fraction of the actual distribution from a pro rata fund of equal amount. In the example given above, claimants in a reversionary settlement will receive 17% of the gross fund, while claimants in a pro rata fund receive 67% of the fund. The chart below illustrates the radically different actual class distributions resulting from pro rata and reversionary settlements:[21]

---

[21] The chart is based upon facts similar to the settlement here: a class of 20,000 members; 5,000 qualifying class members; a 25% response rate; and an attorneys' fees award of 33⅓% of the total settlement fund.

	PRO RATA	REVER-SIONARY	PRO RATA
Total Settlement Fund	$40,000,000	$40,000,000	$10,000,000
Attorneys' Fees Awarded (33% of total settlement fund)	$13,333,333	$13,333,333	$3,333,333
$ Available to Class	$26,666,666	$26,666,666	$6,666,666
Total Class Recovery	$26,666,666	$6,666,666	$6,666,666
$ Paid to Each Qualified Member	$5,332	$1,333	$1,333
Defendants' Total Cost of Settlement	$40,000,000	$20,000,000	$10,000,000
Defendants' Reverter	$0	$20,000,000	$0

This chart demonstrates that *the type of fund chosen by class counsel largely predetermines the actual class distributions*. A reversionary settlement with a gross settlement fund of $40,000,000 and an attorneys' fee of 33⅓% will produce an actual class distribution which is approximately 25% as large as the actual class distribution from a pro rata fund with the same gross settlement fund, assuming that 25% of the class file qualifying claims (*i.e.*, $6,666,666 vs. $26,666,666). The chart also demonstrates that a pro rata settlement with a gross settlement fund which is one-quarter the size of the gross settlement fund in a reversionary settlement will result in the same class distribution; that is, a $10,000,000 pro rata settlement fund will result in the same actual class distribution as a $40,000,000 reversionary settlement fund, assuming 25% of the class file qualifying claims. This comparison of the operation of reversionary and pro rata settlements establishes the following conclusions:

(1) if a court bases class counsel's fee on the nominal gross settlement fund in a reversionary settlement, it

will award that counsel a fee which is identical to the fee awarded in a pro rata settlement which produces an actual class distribution which is four times as large. That is plainly irrational.

(2) if a court awards class counsel a fee of 33⅓% of the nominal gross settlement fund in a reversionary settlement, it will award counsel a fee which is twice the probable actual class distribution.[22] That is plainly unacceptable.

The chart also demonstrates that if courts award fees based on nominal gross settlement funds in reversionary settlements, plaintiffs' counsel will opt for reversionary settlements to maximize their fees at the expense of the plaintiff class. If class counsel in a $10,000,000 pro rata settlement were to propose that they receive a fee of $6,666,667 while the class received $3,333,333, the proposal would be rejected out of hand as unreasonable and overreaching. Indeed, any such request would be a violation of the Rules of Professional Conduct in most states. (*See, e.g.*, Rule 4-1.5 of the Rules Regulating The Florida Bar). Yet that is exactly what happened here.

The District Court awarded a fee of $13,333,333 in a case where the actual class distribution was approximately $6,500,000. In order to secure such a fee in a pro rata case, class counsel would have to obtain an actual class distribution of $26,666,667 (*i.e.*, $13,333,333 is 33⅓% of $40,000,000; $40,000,000 - $13,333,333 = $26,666,667). The District Court thereby granted a fee which was 200% of the actual class distribution and far higher than any Eleventh Circuit precedent.

In awarding plaintiffs' counsel a Fee Award of $13,333,333, the District Court relied on a study by National

---

[22] Such class counsel's fees will exceed the amounts distributed to the class even if higher claim ratios are assumed, up to the point where 50% of the class files qualifying claims.

Economic Research Associates ("NERA").[23] The NERA Study showed that fees awarded in the Eleventh Circuit averaged 43% of the class distribution; in no case did the fee award exceed 50% of the distribution.[24] Defendants' counsel proved that in all Eleventh Circuit cases studied by NERA, the distributions studied were the amounts *actually paid to the class*.[25] The NERA Study also showed that plaintiffs' attorneys' fees in securities class action cases in the twelve federal circuits ranged between 42.2% and 48.5% of class distributions.[26]

The District Court sought to obscure the significance of the NERA Study by placing an ex parte telephone call to NERA. Based on that call, the District Court stated that NERA did not "consider" whether the settlement amounts NERA studied had actually been paid out. (*See* DB App. at pp. W-40; W-54) That statement is irrelevant. By examination of court records and communications with counsel, defendants determined and proved, without contradiction, that the settlement amount in each case studied by NERA in the Eleventh Circuit in fact represented the amount actually distributed. (*See* DB App. at p. W-40; App. M (4/21/97 Siebecker Aff.) at p. M-4, ¶ 12) The District Court's ex parte telephone call unearthed no evidence to contradict that fact.

The Fee Award by the District Court in this case is not only 200% of the amount distributed to the class; it is also 400% of the highest fee award ever made by the district courts in the Eleventh Circuit studied by NERA. That Fee Award is

---

[23] *See* n.2, *supra*. Excerpts from the NERA Study appear in Appendices J and K.

[24] *See* App. K (Table 12b); App. M (4/21/97 Siebecker Aff.) at pp. M-4, ¶ 12; M-6, ¶ 15; and DB App. at p. W-40.

[25] *Id.*

[26] *Id.*

also vastly greater than the average fee awards in securities cases in the other eleven federal courts, as studied by NERA.

The District Court's Fee Award in this case is, therefore, an irrational and unjustifiable departure from past precedent and an undeniable abuse of discretion. The Eleventh Circuit's unqualified endorsement of that exercise of discretion and its refusal to articulate any guidelines governing the relationship of plaintiffs' counsel's fee to the actual class distribution is an abdication of their supervisory jurisdiction.

Since the settlement fund is reduced by the fees paid to class counsel, every dollar paid to class counsel reduces the actual class distribution. Because of the pressures of time and the lack of an adversary process, district court judges are often unable to make a careful and fully informed review of plaintiffs' counsel's fee requests. Under these circumstances, it is essential that class counsel's fees be based on actual class distributions, as they already are in pro rata settlements. Only then will the interests of class counsel be aligned with those of the class. Any other rule, such as the one adopted by the District Court in this case, is an invitation to abuse. Any such rule will inevitably encourage the creation of reversionary settlements with little benefit to the class and exorbitant attorneys' fees.

REASONS FOR GRANTING THE WRIT

I. The Court should grant certiorari to resolve a conflict between the Eleventh Circuit and other Federal Courts in the standards applicable to the determination of class counsel fees.

The decision of the Eleventh Circuit in this case conflicts with the decision of the Ninth Circuit in *Williams v. MGM-Pathe Comm. Co.*, 129 F.3d 1026 (9th Cir. 1997) and the decision of the Fifth Circuit in *Strong v. BellSouth Telecomm. Inc.*, 137 F.3d 844 (5th Cir. 1998). These three Circuit Court decisions involve the question of whether to use actual

distributions or higher nominal settlement amounts as the benchmark in awarding class counsel's fees. These circuits reached different results based upon their respective reading of this Court's opinion in *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980).

In this case, the Eleventh Circuit read *Boeing* to allow, but not mandate, the district court to award class counsel's fees based upon the funds potentially available to the class in a reversionary settlement. The Eleventh Circuit decided that the district court has unfettered discretion to award fees based upon the nominal amount of the Settlement Fund irrespective of the amount disbursed to the class:

> "Nothing in this opinion precludes a district court judge in a different case from basing the attorneys' fee award on the actual class recovery or on the gross settlement figure." (190 F.3d at 1298; App. A at p. A-13)

In *Williams*, the Ninth Circuit reversed a district court's attorneys' fee award which was based on the actual class distribution rather than the nominal gross settlement fund in a reversionary settlement. The Ninth Circuit's view is that *Boeing requires* that district courts base their fees on the nominal gross settlement fund; the district court does not have discretion to base the fee on the amount actually distributed to the class:

> "We conclude that the district court abused its discretion by basing the fee on the class members' claims against the fund rather than on a percentage of the entire fund or on the lodestar." *Williams*, 129 F.3d at 1027.

The *Williams* court reached this conclusion based upon an expansive reading of Boeing:

> "[T]he [*Boeing*] Court concluded that the attorneys for a successful class may recover a fee based on the entire common fund created for the class, even if some class members make no claims against the fund so that money

remains in it that otherwise would be returned to the defendants." *Id.*

In *Strong*, the Fifth Circuit stated its view of whether *Boeing* required an attorneys' fee award to be based upon the nominal settlement fund in a reversionary settlement. The Fifth Circuit held *Boeing* was *not* controlling on the issue, because the settlement under review was a reversionary fund where defendant's liability was contingent upon class members' eligibility to receive the benefits of the settlement:

> "Because of the absence of any fund and because the value of the settlement was contingent on class members' desire to continue the plan as well as their eligibility for the credit, we reject the contention of plaintiffs' counsel that the district court abused its discretion by not basing the attorneys' fee award on the $64 million 'common fund' value." *Strong*, 137 F.3d at 852.

The Fifth Circuit is clearly right in its construction of *Boeing*. In *Boeing* this Court ruled that the American rule against fee shifting did not bar taxing a portion of whatever counsel's fees were awarded against nonclaiming class members where the defendant was subject to a non-appealable judgment establishing class-wide liability. This Court did not decide what attorneys' fee should be awarded in *Boeing*. This Court accepted the fee set by the lower court and held only that the American Rule against fee shifting did not bar whatever fee was set. The *Boeing* Court specifically declined to decide whether actual or nominal distributions should be used in determining class counsel's fees for reversionary settlements:

> "The District Court explicitly ordered that 'plaintiffs [on] behalf of all members of the plaintiff class . . . shall recover as their damages herein from the defendants the principal sum of $3,289,359 together with interest. . . .' . . . Nothing in the court's order made Boeing's liability for this amount contingent upon the presentation of individual claims. *Thus, we need not decide whether a class-action*

> *judgment that simply requires the defendant to give security against all potential claims would support a recovery of attorney's fees under the common-fund doctrine.*" *Boeing*, 444 U.S. at 481 n.5 (emphasis added, citations omitted).

The *Boeing* court made it clear that it was treating Boeing's liability as a fixed liability because Boeing was subject to a final judgment which Boeing had not appealed, notwithstanding the fact that Boeing had a latent claim which it might assert in another case. The *Boeing* court made it clear that *in that case* defendants' liability was fixed and not subject to a reversion. *Boeing* simply acknowledged that when defendants' liability is fixed, class counsel could be paid based upon a percentage of the fund obtained from the settling defendant. This is quite different from a reversionary settlement which only establishes a claims procedure with security and defendants' ultimate liability can be determined only after conclusion of the claims process.

Boeing is premised upon the rationale that "a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole". *Id.*, at 478. *Boeing does not, however, prescribe the standard to be applied to a common fund in determining what constitutes a reasonable fee. Boeing* does not state that a reasonable fee can be determined *without regard to the actual class recovery paid out to the class*, or without regard to class counsel's efforts in creating either a pro rata or reversionary fund, which single decision largely predetermines the class recovery.

Boeing does not comment on the effect that meaningful claims procedures in a reversionary settlement—which reduce class recovery—should have on establishing a reasonable attorney's fee for the lawyer responsible for creating the settlement. Certainly, *Boeing* does not endorse payment of a legal fee in an amount which is 200% of what the class received, which is what the District Court ruled in this case.

Boeing left open the lower court's ability to base the percentage of the common fund which the attorney receives upon the distribution made to the class. Lastly, *Boeing* does not state that a reasonable attorney's fee would be the same for a lawyer who creates a $40,000,000 pro rata settlement netting $26,666,666 to the class, as for a lawyer who creates a reversionary settlement netting $6,450,000 to the class.

Plaintiffs' counsel rely heavily on *Boeing*'s statements that attorneys are entitled to a "reasonable" fee from a common fund. Those statements cannot rightly be used to justify their fee of 200% of class recovery—a recovery that they in fact predetermined by agreeing to a reversionary fund with strict claims procedures.

The confusion among the circuit courts has also lead to inconsistent district court opinions, although most use actual distributions as the benchmark in awarding counsel fees. *See Wise v. Popoff*, 835 F. Supp. 977, 981 (E.D. Mich. 1993). ("The Court determines that a more reasonable fee results from calculating a percentage of actual recovery."); *Goodrich v. E.F. Hutton Group, Inc.*, No. 8279, 1996 WL 76161, at *2-*3 (Del. Ch. 1996). ("[This court's] order limited the fee awarded to one-third of the benefits *actually delivered* to class members. The Boeing case does not, in my opinion, require or suggest that that approach was erroneous. . . . [O]ne should nevertheless ask whether a rule of law that would hold that there is an entitlement, on the part of class counsel, to a legal fee fixed in relation to a maximum available fund rather than benefits actually realized by the class members, would be a desirable general rule . . . . In my opinion, the answer is certainly no." (emphasis supplied)) *See also Strong v. BellSouth Telecomm. Inc.*, 137 F.3d 844, 851-52 (5th Cir. 1998); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 572, 588-89 (D.N.J. 1997), *vacated in part on other grounds*, 1998 WL 409156 (3d Cir. 1998); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 989 F. Supp. 375, 378-79 (D.Mass. 1997); *Bowling v. Pfizer, Inc.*, 927 F. Supp. 1036

(S.D. Ohio 1996); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 348-51 (N.D. Ga. 1993); *Bussie v. Allmerica Financial Corp.*, 1999 WL 342042 at *2 (D.Mass. 1999). *But see In re Copley Pharmaceutical Inc.*, 1 F. Supp. 2d 1407 (D.Wyo. 1998) (district court approved under *Boeing* the payment of attorneys' fees from the gross settlement fund); Herbert B. Newberg and Alba Conte, *Newberg on Class Actions* § 14.03, at 14-14 (3 ed. 1992).

The Eleventh Circuit decision also is in conflict with other federal authorities as to the amount of attorneys' fees awarded to class counsel. The Eleventh Circuit has approved a counsel fee ($13,333,333) which is more than double the actual class distribution (approximately $6,500,000), and more than four times past precedent in the Eleventh Circuit and every other circuit in the country. Prior to this decision, no district court in the Eleventh Circuit had ever granted a fee in excess of 50% of the actual class distribution in a securities class action.[27] Fees in Eleventh Circuit securities class actions averaged 43% of the actual class distributions. Average fees in the other eleven circuits in such cases fall in a range of 42% to 48.5% of the class distribution. The result reached in this case is, therefore, in conflict with the vast majority of cases setting attorneys' fees in securities class actions. This Court should grant certiorari and review the case below to establish the proper relationship between class counsel's fees and actual distributions in class actions involving money damages in tort cases. Given the prevalence of such litigation in the federal courts, prompt resolution of that question is of crucial importance to the reputation of the federal courts.

---

[27] *See* App. K (Table 12b); App. M (4/21/97 Siebecker Aff.) at pp. M-4, ¶ 12; M-6, ¶ 15; and DB App. at p. W-40.

II. This Court should grant certiorari to put an end to plaintiffs' counsel's manipulation of reversionary settlements to enrich themselves at the expense of their class clients.

The manipulation of reversionary settlements to enrich class counsel at the expense of their class clients is scandalous. Public confidence in the judicial system is undermined by the prosecution of lawsuits which do more to enrich lawyers than compensate plaintiffs, particularly where, as here, the self-enrichment is obtained at the expense of the lawyer's clients. The Fee Award of 200% of the class distribution in this case is bound to bring discredit upon the federal courts.

The public outcry against such scandalous practices has been so great that the Congress recently enacted the Private Securities Litigation Reform Act. That Act provides that attorneys' fees in securities class actions shall not exceed a "reasonable percentage" of the damages "actually paid" to class members. 15 U.S.C. § 77z-1(a)(6). In the decision below the Eleventh Circuit simply asserted that it declined to apply the policy of the PSLRA, without offering any rationale whatsoever. (190 F.3d at 1297 n.11; App. A at p. A-12)

Indeed, the Eleventh Circuit declined to articulate any rule at all governing the relationship between fee awards and the amounts actually received by class members. In the Eleventh Circuit, a district court has unguided discretion to use the amount of the actual distribution or the amount of the purely nominal gross settlement fund in a reversionary case. Indeed, the Circuit Court actually said:

> "Nothing in this opinion precludes a district court judge in a different case from basing the attorneys' fee award on the actual class recovery or on the gross settlement figure." (190 F.3d at 1298; App. A at p. A-13)

A district court in the Eleventh Circuit may choose to base counsel's fee on the purely nominal gross settlement fund even if the fee is twice the amount of the actual class distribution and

four times the highest fee ever before given. The Eleventh Circuit gives the district courts the discretion to do so without providing any guidance or limitation on the exercise of that discretion. The Eleventh Circuit thereby abdicated its responsibility for appellate supervision by simply rubber-stamping whatever decision the district courts may make.

The Court should seize this opportunity to declare the proper relationship between counsel's fees and the actual distribution made to class plaintiffs in class actions seeking money damages for tort injuries. Given the public condemnation which excessive attorneys' fees elicit, there should be some easily understood standard governing this relationship. Otherwise, plaintiffs' counsel will continue to manipulate reversionary settlements to enrich themselves and the federal courts will decline in public esteem. Reasonable persons can differ over what rule should be adopted, but there can be no reasonable doubt that there should be some rule.

Defendants believe that plaintiffs' class counsel's fee awards must be limited to a reasonable percentage of the amounts actually distributed, whether the settlement is pro rata or reversionary. That is already the rule in pro rata cases where the entire settlement fund is paid out. When a court awards a fee equal to 33⅓% of the settlement fund in a pro rata case, that fee will necessarily be no more than 50% of the amount distributed to the class.

This Court should ensure that the same rule is applied to reversionary settlements. Such a rule would effectively end the abuse of reversionary settlements to enrich class counsel at the expense of their class clients. Such a rule would protect district courts from unwitting involvement in settlements which do more to benefit plaintiffs' counsel than they do the injured class members. Such a rule could be easily understood and would contribute to the restoration of public confidence. Such a rule would eliminate the current irrational discrimination between plaintiffs' counsel's fees in pro rata settlements and counsel's fees in reversionary settlements. Such a rule would be

consistent with the policy established by the Congress in the Private Securities Litigation Reform Act, which limits class counsel's fees to a "reasonable percentage" of the "damages" "actually paid" to the class members.

Perpetuation of existing practices will injure the interests of class plaintiffs and impair public confidence in the court system. Perpetuation benefits only one group: plaintiffs' class counsel interested in the manipulation of reversionary settlements for their own benefit.

This Court should grant certiorari in this case to establish that rule because the Court is unlikely to get another opportunity to do so. These self-enriching manipulations are rarely litigated and even more rarely appealed. Plaintiffs' counsel have effectively suppressed the adversary process by issuing misleadingly incomplete class notices which fail to disclose the relationship between their fees and the actual class distributions and blackmailing defendants into silence. Denial of certiorari will only serve to perpetuate these scandalous practices.

III. This Court should not allow plaintiffs' counsel to deprive defendants of appellate review.

Defendants anticipate that plaintiffs' counsel will seek to preserve the barriers which they have erected against appellate review by arguing that defendants' entry into what the courts have referred to as "clear sailing" agreements should deprive defendants of any appellate review. A critical element in the extortion of exorbitant fees by plaintiffs' counsel has been their suppression of the adversary process. First, class counsel issue misleading notices which fail to disclose counsel's intention to seek a fee which is greater than the actual class distribution. Class counsel then seek to stifle an adversary presentation from defendants by requiring that defendants either agree to a fee or remain silent. In this case, defendants refused to agree to

plaintiffs' fee.[28] Instead, they agreed only to a limited form of "clear sailing" agreement in which they agreed not to directly or indirectly oppose plaintiffs' fee application.[29]

Defendants did so relying that plaintiffs would submit a truthful fee application and that the District Court would exercise its powers under Fed. R. Civ. P. 23 in accordance with past precedent. That reliance proved unfounded. Plaintiffs' counsel submitted a misleading fee application which misrepresented the purely nominal $40,000,000 settlement fund as an actual distribution and failed to disclose that the actual distribution in this case would be much lower (approximately $6,500,000).

The few federal courts which have had the opportunity to review clear sailing agreements have condemned them. The First Circuit expressly condemned clear-sailing agreements in *Weinberger*, *supra* at n.17:

> "Over a decade ago, we first spoke about the important nexus between judicial scrutiny and the avoidance of excessive or undeserved fee awards in the class action environment. . . . The problem has two aspects: extortion . . . and collusion . . . . We think the district court was constrained to recognize as a practical matter that the lawyers were in a position to coerce a fee agreement from G-P regardless of whether there was any merit to their claim . . . . [T]he scenario was such as to suggest, strongly, that the fee request be placed under the microscope of judicial scrutiny. This course was particularly indicated because of the presence of the clear sailing agreement. Such a clause by its nature deprives the court of the advantages of the adversary process . . . ." *Weinberger*, 925 F.2d at 524-525.

---

[28] The Circuit Court mistakenly assumed that defendants had entered into a fee agreement. (190 F.3d at 1300; App. A at p. A-17)

[29] *See* App. G (Stipulation of Settlement, dated January 17, 1997) at p. G-36; *see also* DB App. at pp. W-43; and W-59.

The Second Circuit has articulated similar concerns:

> "I . . . write these additional words only to express a caution concerning the continued use in settlements of a 'clear sailing' clause whereby a defendant agrees not to challenge a plaintiff's request for attorney's fees up to a stipulated amount . . . . A 'clear sailing' clause has two adverse effects that cast substantial doubt on the legitimacy of its use. First, it deprives the trial court and a reviewing court of the certainty of having the propriety of the fee request tested in the adversary process . . . . In future cases, it may be well to scrutinize carefully the use of 'clear sailing' clauses. Perhaps they should be forbidden in all cases." *Malchman*, 761 F.2d at 907-908 (Newman, J., concurring).

Whatever view this Court may take of the enforceability of clear sailing agreements generally, this Court should not countenance plaintiffs' counsel's attempt to deprive defendants of appellate review in this case where they have sought to enrich themselves by a plainly misleading fee application and the District Court's undeniable abuse of discretion.

Plaintiffs' counsel will also likely argue that defendants' counsel supported the reasonableness of plaintiffs' fee application during hearings on the approval of the settlement which were held during the week of January 26, 1997 and on March 31, 1997. Defendants have made the transcripts of all such hearings part of the record on the appeal. There is no support for any such contention in any of those transcripts. At no time did defendants' counsel ever argue in support of plaintiffs' counsel's fee.[30]

In an order dated May 8, 1997, the District Court observed that it believed that defendants' counsel had made some undescribed statement supporting plaintiffs' fee application during preliminary fairness hearings held in the week of

---

[30] *See* DB App. at pp. W-33 to W-36.

January 26, 1997.[31] The District Court was mistaken. Defendants have submitted the affidavits of all three defense counsel present during that week attesting to the fact that no such statement was made.[32] Indeed, plaintiffs' counsel did not assert that defendants' counsel had supported their fee application at any time prior to the District Court's May 8 order, despite the fact that plaintiffs' fees were the subject of intensive briefing.[33] It was only after the District Court's May 8 order that plaintiffs' counsel seized upon that statement in the order in an attempt to secure dismissal of defendants' appeal. Given the intensity of the exchanges concerning plaintiffs' fee application, plaintiffs' counsel would clearly have asserted that defendants had supported the Fee Award if that was in fact the case. It was not. Not only is there no record support for any argument that defendants supported plaintiffs' fee application; the only relevant evidence in the record is to the contrary.

Plaintiffs will also likely seek to prejudice defendants' petition for certiorari by rehashing their longstanding diatribe against defendants' business practices. Their allegations are refuted point-by-point in defendants' briefs on appeal which have been made a part of the Appendix. (*See* Apps. W and X) For present purposes, it is sufficient to note that plaintiffs chose, on the eve of closing statements, to enter a settlement which provided the plaintiff class with only 5% of their claimed investment loss—an amount which is typical in settlements of such cases and the best available evidence of the depth of plaintiffs' counsel's convictions.

---

[31] *Id.*; *See* App. S (Order Denying Defendants' Motion Pursuant to Fed. R. Civ. P. 52(b) and 59(e), filed May 8, 1997) at p. S-4.

[32] *See* App. T, including: Affidavit of Paul M. Dodyk, sworn September 9, 1998 (pp. T-11 to T-14); Declaration of Martin I. Kaminsky, dated August 28, 1998 (pp. T-15 to T-17); and Affidavit of R. Lawrence Bonner, dated August 13, 1998 (pp. T-18 to T-21).

[33] *See* DB App. at pp. W-33 to W-36.

Plaintiffs' ad hominem recriminations should not be allowed to deflect this Court's attention from the very important issue tendered by this petition. Establishing a standard governing the relationship of class counsel's fee to actual class distributions is not only an important question of law. Its prompt resolution is also necessary to protect the reputation of the federal courts from being sullied by the scandalous manipulation of reversionary settlements to enrich class counsel.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted to review the decision of the Eleventh Circuit Court of Appeals.

March 22, 2000

Respectfully submitted,

PAUL M. DODYK
Counsel of Record

CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
Telephone: (212) 474-1000
Facsimile: (212) 474-3700

R. Lawrence Bonner
HOMER, BONNER &
DELGADO, P.A.
100 S.E. Second Street
Miami, FL 33131
Telephone: (305) 350-5100
Facsimile: (305) 379-0918

Martin I. Kaminsky
POLLACK & KAMINSKY
114 West 47th Street
New York, NY 10036
Telephone: (212) 575-4700
Facsimile: (212) 575-6560

Attorneys for Petitioners

(2) FILED
991560 MAR 22 2000

No. 99-

IN THE

Supreme Court of the United States

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, INDIVIDUALLY AND AS TRUSTEE OF THE JASON GROSFELD TRUST, MULTIVEST REAL ESTATE, INC., S.S. MELBOURNE, INC., AND THE CYPRESS GROUP, INC.,

Petitioners,

v.

WILLIAM WATERS AND LINDA BARTHOLOMEW, INDIVIDUALLY AND ON BEHALF OF ALL THOSE SIMILARLY SITUATED,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

PAUL M. DODYK
Counsel of Record

CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
Telephone: (212) 474-1000
Facsimile: (212) 474-3700

R. Lawrence Bonner
HOMER, BONNER & DELGADO, P.A.
100 S.E. Second Street
Miami, FL 33131
Telephone: (305) 350-5100
Facsimile: (305) 379-0918

Martin I. Kaminsky
POLLACK & KAMINSKY
114 West 47th Street
New York, NY 10036
Telephone: (212) 575-4700
Facsimile: (212) 575-6560

Attorneys for Petitioners

March 22, 2000

TABLE OF CONTENTS

Page

Opinions & Orders

Appendix A — Opinion of the United States Court of Appeals for the Eleventh Circuit, filed September 30, 1999 ..... A-1

Appendix B — Order with respect to Notice, Settlement Hearing and Administration of Class Action Settlement, signed by Judge Ungaro-Benages on January 31, 1997 (United States District Court for the Southern District of Florida) B-1

Appendix C — Final Order and Judgment Approving Settlement, filed April 2, 1997 (United States District Court for the Southern District of Florida) C-1

Appendix D — Amendment to Final Order and Judgment Approving Settlement, filed May 8, 1997 (United States District Court for the Southern District of Florida) D-1

Appendix E — Order Granting in part Motion of Plaintiffs' Class Counsel to Alter or Amend Judgment with respect to Cost Award, signed May 8, 1997 (United States District Court for the Southern District of Florida) E-1

Order on Rehearing

Appendix F — Order denying Petition for Panel Rehearing and Petition for Rehearing en banc, filed December 23, 1999 ..... F-1

		Page
Other Material filed before the United States District Court for the Southern District of Florida		
Appendix G	Stipulation of Settlement, dated January 17, 1997	G-1
Appendix H	Exhibit A-1 to Stipulation of Settlement, dated January 17, 1997: [Draft] Notice of Proposed Settlement of Class Action, Settlement Hearing, and Right to Appear	H-1
Appendix I	Exhibit A-2 to Stipulation of Settlement, dated January 17, 1997: [Draft] Summary Notice	I-1
Appendix J	Excerpts from Denise N. Martin et al., National Economic Research Associates, Recent Trends IV: What Explains Filings & Settlements in Shareholder Class Actions?, (1996) ...	J-1
Appendix K	Table 12b from Denise N. Martin et al., National Economic Research Associates, Recent Trends IV: What Explains Filings & Settlements in Shareholder Class Actions?, (1996) ...	K-1
Appendix L	Defendants' Motion Pursuant to Fed. R. Civ. P. 52(b) and 59(e), dated April 21, 1997	L-1
Appendix M	Affidavit of Michael R. Siebecker, executed April 21, 1997	M-1
Appendix N	Declaration of Martin Kaminsky, executed April 24, 1997	N-1

		Page
Appendix O	Declaration of Paul M. Dodyk, executed April 24, 1997	O-1
Appendix P	Declaration of Martin I. Kaminsky, (undated, but executed on or about May 8, 1997)	P-1
Appendix Q	Declaration of Paul M. Dodyk, dated May 8, 1997	Q-1
Appendix R	Declaration of Matthew S. Schweber, dated May 8, 1997	R-1
Appendix S	Order Denying Defendant's Motion Pursuant to Fed. R. Civ. P. 52(b) and 59(e), filed May 8, 1997	S-1

Other Material filed before the United States Court of Appeals for the Eleventh Circuit

Appendix T	Motion of Defendants-Appellants Pursuant to Federal Rule of Appellate Procedure 10(e) to Supplement the Record on Appeal with Affidavit of Paul M. Dodyk in Support Thereof, dated September 9, 1998	T-1
Appendix U	Appellants' Reply to Appellees' Opposition to Appellants' Motion Pursuant to Federal Rule of Appellate Procedure 10(e) to Supplement the Record on Appeal, dated September 23, 1998	U-1

		Page
Appendix V	Order Granting in part and Denying in Part Appellants' Motion to Supplement the Record on Appeal, and Granting Appellees' Motions to Strike Portions of Appellants' Brief and for Extension of Time, filed October 6, 1998	V-1
Appendix W	Brief for Defendants-Appellants, dated October 16, 1998 (filed in the United States Court of Appeals for the Eleventh Circuit)	W-1
Appendix X	Reply Brief for Defendants-Appellants, dated November 6, 1998 (filed in the United States Court of Appeals for the Eleventh Circuit)	X-1

APPENDIX A

Opinion of the United States Court of Appeals for the Eleventh Circuit, filed September 30, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-5074

D.C. Docket No. 90-6863-CV-UUB

WILLIAM WATERS, LINDA BARTHOLOMEW,
individually, and on behalf of all those similarly situated,

Plaintiffs-Appellees,

versus

INTERNATIONAL PRECIOUS METALS
CORPORATION, MULTIVEST, INCORPORATED, et. al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(September 30, 1999)

Before TJOFLAT and BIRCH, Circuit Judges, and BRIGHT*,
Senior Circuit Judge.

---

* Honorable Myron H. Bright, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

BIRCH, Circuit Judge:

In this class action, customers of the commodity futures brokerage firm, MultiVest Options, Inc. ("MOI"), brought suit against the firm and its brokers and alleged that the defendants engaged in a scheme to defraud customers by soliciting and stimulating excessive trading in commodities options. James Grosfeld, as owner of MOI's parent company, MultiVest, Inc., is the primary defendant in the case, as MultiVest, Inc. is substantially insolvent.

After seven years of extremely contentious litigation and five months of trial, the parties agreed to a settlement prior to the scheduled date of closing arguments to the jury.[1] The settlement created a $40 million fund to pay claims of class members and the fees and expenses of the plaintiffs' attorneys. The fund was "reversionary," meaning that any unclaimed amounts would revert to defendant Grosfeld, the sole source of funding for the settlement. Defendants now argue that (1) the district court's award of $13.3 million in fees to the plaintiffs' attorneys was an abuse of discretion, (2) they are not prohibited from challenging the fee award even though the settlement agreement contained a "clear sailing" provision whereby defendants agreed not to challenge the fee award application, (3) the district court's order finding that plaintiffs' counsel's fee award is assignable is reversible error, and (4) the district court's approval of plaintiffs' attorneys' expense request was an abuse of discretion. We address each of these issues in turn.

I. FEE AWARD

On the eve of closing arguments, the parties reached a settlement stipulation and presented the agreement to the district court. In pertinent part, the settlement provided that defendant Grosfeld would provide the money to fund a settlement of $40 million with which to satisfy the claims of the

---

[1] The merits of the underlying class action, notwithstanding the energy devoted to those topics by counsel, are not at issue in this appeal.

plaintiff class. The fund would consist in part of cash payments and in part promissory notes. In addition, the stipulation provided that any money not claimed by the plaintiff class or used to pay out fees and expenses would revert to defendant Grosfeld. *See* R31-1371, § 6.2(e), at 43.

The stipulation also provided that plaintiffs' class counsel would apply for attorneys' fees "in an amount not to exceed 33-1/3% of the Settlement Fund plus their costs and expenses." *Id.*, § 7.1, at 54-55.[2] Finally, the stipulation included a "clear-sailing" agreement which provided that "Defendants will not directly or indirectly oppose Plaintiff's Class Counsel of Record's application for fees and expenses or compensation of the Representative Plaintiffs." *Id.* at 55.[3] The district court conducted numerous hearings and conferences among the parties on the provisions of the settlement agreement. On January 31, 1997, the district court held a hearing in open court on the pending motion for preliminary approval of the stipulation of settlement. The court gave preliminary approval and dismissed the jury. The final fairness hearing was held on March 31, 1997. The district court approved the settlement and awarded plaintiffs' class counsel $13.3 million in attorneys' fees. *See* R132-1518-94. The court postponed consideration of

---

[2] Under the agreement, "settlement fund" is defined as "the sum of the cash and aggregate initial principal amount of the Master Promissory Note to be delivered to the Settlement Administrator pursuant to § 2.2 of this Stipulation." R31-1371, § 1.36, at 15. Section 2.2 provides: "Defendants shall cause James Grosfeld to deposit the Settlement Fund in the amount of $40,000,000 by delivery actually made to the Settlement Administrator, contemporaneously with the entry of an order by the United States District Court for the Southern District of Florida preliminarily approving this Stipulation." *Id.*, § 2.2, at 17.

[3] Such agreements are sometimes included in class action settlements so that defendants have a more definite idea of their total exposure. *See Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 520 n. 1 (1st Cir.1991) ("In general, a clear sailing agreement is one where the party paying the fee agrees not to contest the amount to be awarded by the fee-settling court so long as the award falls beneath a negotiated ceiling.").

expenses and asked the plaintiffs' counsel to provide additional documentation. After two additional conferences on April 25 and April 28, 1997, the district court awarded plaintiffs' class counsel $2,400,204 in expenses. *See* R35-1543-2.

We review a district court's award of attorneys' fees for abuse of discretion. *Camden I Condominium Assoc., Inc. v. Dunkle*, 946 F.2d 768, 770 (11th Cir.1991). The district court "has great latitude in formulating attorney's fees awards subject only to the necessity of explaining its reasoning so that we can undertake our review." *McKenzie v. Cooper, Levins & Pastko, Inc.*, 990 F.2d 1183, 1184 (11th Cir.1993) (internal quotation omitted).

> By definition . . . under the abuse of discretion standard of review there will be occasions in which we affirm the district court even though we would have gone the other way had it been our call. That is how an abuse of discretion standard differs from a *de novo* standard of review. As we have stated previously, the abuse of discretion standard allows a range of choice for the district court, so long as that choice does not constitute a clear error of judgment.

Purcell v. BankAtlantic Fin. Corp., 85 F.3d 1508, 1513 (11th Cir.1996) (citation omitted).

In considering a fee award in the class action context, the district court has a significant supervisory role. Federal Rule of Civil Procedure 23(e) mandates that a "class action shall not be dismissed or compromised without the approval of the court." *See also Evans v. Jeff D.*, 475 U.S. 717, 726, 106 S.Ct. 1531, 1537, 89 L.Ed.2d 747 (1986) ("Rule 23(e) wisely requires court approval of the terms of any settlement of a class action."). Upon reviewing the voluminous record in this case, we find no

abuse of discretion by the district court and affirm the award of attorneys' fees.[4]

On March 31, 1997, the district court presided over a fairness hearing concerning the proposed Settlement Agreement. At that hearing, after noting the objections raised by the defendants, the district court proceeded to discuss the attorneys' fee award with reference to *Boeing Co. v. Van*

---

[4] Because we find no abuse of discretion by the district court in its award of fees and expenses, we need not address the ramifications of the "clear sailing" agreement on the defendants' ability to challenge the fee award in this case. We note that clear sailing agreements have been the subject of some controversy in the class action arena. In *Malchman v. Davis*, 761 F.2d 893 (2d Cir.1985), *abrogated on other grounds*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), the court upheld an attorneys' fee award from a settlement agreement that contained a clear sailing clause. The writing judge noted that while the district court judge should always be the ultimate determiner of the fee award, "where . . . the amount of the fees is important to the party paying them, as well as to the attorney recipient, it seems . . . that an agreement 'not to oppose' an application for fees up to a point is essential to the completion of the settlement, because the defendants want to know their total maximum exposure and the plaintiffs do not want to be sandbagged." *Id.* at 905 n. 5. In contrast, a concurring panel member noted that clear sailing agreements had "adverse effects" in that they take away the advantages of the adversarial process and create the likelihood that plaintiff counsel will negotiate away something of value to the class in order to procure the defendant's agreement not to challenge the fee award. *Id.* at 907-08 (Newman, J., concurring). Significantly, the district court here made a factual finding that there had not been any collusion among the parties. *See* R132-1518-64 ("it should be noted that the settlement plainly is not collusive in any respect").

Other courts have not been as suspicious of clear sailing agreements reached after arms-length negotiations. *See Skelton v. General Motors Corp.*, 860 F.2d 250, 259-60 (7th Cir.1988) (noting that a settlement agreement is a contract and when a party "accepted the benefits of the contract . . . [h]e cannot obtain the *quid* of the settlement agreement and avoid the *quo* of foregoing his right to appeal."). We are satisfied that the district court here fulfilled its Rule 23 supervisory function and decline to address the clear sailing agreement.

Gemert, 444 U.S. 472, 100 S.Ct. 748, 62 L.Ed.2d 676 (1980) and *Camden I*. *See* R132-1518-84-85. In *Boeing*, the Supreme Court rejected petitioner's argument that the attorneys' fee award could be based only on the portion of the common fund actually claimed by class members and not from the unclaimed portion of the fund. *See Boeing*, 444 U.S. at 477, 100 S.Ct. at 749. The Court found that "to claim their logically ascertainable shares of the judgment fund, absentee class members need prove only their membership in the injured class. Their right to share the harvest of the lawsuit upon proof of their identity, *whether or not they exercise it*, is a benefit in the fund created by the efforts of the class representatives and their counsel." *Id.* at 480, 100 S.Ct. at 750 (emphasis added). *Boeing*, as in the case at bar, involved the defendant's potential claim on undispersed portions of the fund, causing the Court to note that Boeing's "latent claim against unclaimed money in the judgment fund may not defeat each class member's equitable obligation to share the expenses of litigation." *Id.* at 482, 100 S.Ct. at 751.

In *Camden I*, we held that "attorney's fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class." 946 F.2d at 774. We further noted that the "majority of common fund fee awards fall between 20% to 30% of the fund." *Id.* Finally, we directed district courts to view this range as a "benchmark" which "may be adjusted in accordance with the individual circumstances of each case," using the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir.1974), *abrogated on other grounds, Blanchard v. Bergeron*, 489 U.S. 87, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989). *Id.* at 775.[5]

---

[5] *Johnson* instructs that district court should consider twelve factors in determining attorneys' fee awards: (1) time and labor, (2) novelty and difficulty of the questions, (3) requisite skill, (4) preclusion of other employment, (5) customary fee, (6) fixed or contingent fee, (7) time limitations, (8) amount involved and results obtained, (9) experience, reputation and ability of attorneys, (10) "undesirability" of the case,

After determining that the benchmark in this case should be 30%, *see* R132- 1518-87, the district court proceeded to consider whether the benchmark should be adjusted up or down based on the circumstances of the case as analyzed under the twelve factors outlined in Johnson. *Id.* at 86-93. The district court concluded that all factors were either neutral or required an upward adjustment in the benchmark percentage. *Id.* Following the directives of *Camden I*, the district court factored an additional upward adjustment for the time taken to reach settlement through seven years of litigation and five months of trial. The district court further found that the case served an unusual public policy by highlighting the potential for "boiler room" tactics in the commodities industry. *Id.* at 94. The district court then concluded that "class counsel is entitled to a small upward adjustment in the benchmark of 30%, and that the appropriate adjustment is to the percentage of the fund requested by class counsel as its fee, that is, 33 1/3%, or $13,333,333." *Id.*

The defendants' primary argument seems to be that the attorneys' fee award was based on a percentage of the total fund rather than the actual payments made to class members.[6] The district court, however, considered the possibility that the actual payout would be less than the total fund generated for the settlement and noted that

> after seven years the number of class members actually asserting claims will be significantly lower than the class membership. I can also anticipate that the number of class members who end up having approved claims, who will actually demand payment on their notes after five years similarly will decrease,

---

(11) nature and length of professional relationship with client, and (12) award in similar cases. 488 F.2d at 717-19.

[6] The estimated actual payment to class members is $6,485,362.15. *See* R35-1563-13.

> so that the actual dollars paid out will be substantially less than $40 million.

R132-1518-91-92.[7]

---

[7] Defendants' assertion to the contrary notwithstanding, the district court reiterated, in its denial of defendants' motion to amend the final order and judgment approving the settlement, that the "Court is, and was at the time the Final Judgment was entered, well aware that there is a distinction between the ratio of attorneys' fee to the value of the class members' recovery in a common fund settlement in circumstances where the entire fund is distributed to class members asserting claims on a *pro rata* basis as opposed to circumstances where, as here, the defendants were able to successfully negotiate for a reversion of any unclaimed portion of the fund." R35-1544-2.

The district court also rejected defendants' suggestions that it was "misled" by the National Economic Research Associates (NERA) study on class actions offered by both parties in support of the settlement agreement, and that the NERA Study presented attorneys' fees as a percentage of the actual payout rather than of the total fund. The district court responded that:

> [Defense counsel's argument] (1) conflicts with the position he took earlier in the case when he was seeking the Court's preliminary approval of the Stipulation of Settlement that the fee application specifically contemplated by the Stipulation of Settlement, i.e. $13,333,333 representing 33 and one-third percent of the $40 million Settlement Fund, was reasonable and that its reasonableness was supported by his experience in other class actions and consistent with the conclusions contained in the NERA Study; (2) conflicts with the Defendants' express undertaking that they would not oppose Plaintiffs' fee application so long as it did not exceed 33 and one-third percent of the $40 million Settlement Fund; and (3) conflicts with the term "settlement value" as used in the NERA Study, the plain meaning of which is the gross amount of the settlement pursuant to the Final Judgment as stated in the Final Settlement Notice to class members. In fact, the Court's understanding of NERA's usage of the term "settlement value" has been confirmed to the undersigned by Todd S. Foster, a representative of NERA who was one of the authors of the NERA Study.

R35-1544-4.

Contrary to defendants' assertion, no case has held that a district court must consider only the actual payout in determining attorneys' fees.[8] *Strong v. BellSouth Telecommunications, Inc.*, 137 F.3d 844 (5th Cir.1998), does not mandate that a district court must consider only the actual award made to the class. Rather, *Strong* held that it was not an abuse of discretion for a district court judge to consider the actual award paid out to the class in determining whether a fee application was reasonable. *Id.* at 852-53. The Fifth Circuit, in fact, noted that while the district court's request for information concerning the actual claims was "not the usual" course of action, it was not an abuse of discretion under the circumstances presented to the district court. *Id.* at 853. Additionally, unlike the case at bar, *Strong* never established a "common fund" from which money would be drawn. *See Strong*, 137 F.3d at 852 ("[N]o fund was established at all in this case."). In contrast, the parties here established that $40 million was the fund upon which the amount of the individual claimants' awards would be based. The district court here never made a determination that this amount was illusory. Cf. *id.* (finding that common fund figure was "phantom").

---

[8] In *Goodrich v. E.F. Hutton Group, Inc.*, No. 8279 (Del. Ch. Feb. 2, 1996), *aff'd*, 681 A.2d 1039 (Del.1996), the judge, in his discretion, chose to base the percentage of the attorney fee award on the actual payment to claimants. Unlike the case at bar, *Goodrich* did not involve a situation where each claimant had an "undisputed and mathematically ascertainable claim" to part of the judgment. *Id.* at 1048. Furthermore, *Goodrich* emphasized that the "award of attorneys' fee in a common fund case is committed to the sound discretion of the trial court." *Id.* at 1050 n. 12. The court further declined to adopt a mandatory methodology for determining attorneys' fees. *Id.* at 1050. The fact that the cases cited by the defendants emphasize that attorneys' fee awards are in the discretion of the district court and decline to adopt a strict method of calculation, illustrate that whether a district court judge considers the total fund or the actual payment will vary according to the circumstances of each case. Here, where the district court considered both the total fund and the possibility that the actual payment would be substantially lower, there is no abuse of discretion.

Moreover, in *Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026 (9th Cir.1997) (per curiam), a class action reversionary fund case, the Ninth Circuit held that the "district court abused its discretion by basing the fee on the class members' claims against the fund rather than on a percentage of the entire fund or on the lodestar." *Id.* at 1027 (footnote omitted). The court found that the attorneys' fee award should have been based on a percentage of the total recovery fund, $4.5 million, even though the actual payout only totaled approximately $10,000. Interestingly, in addressing arguments similar to those presented by the defendants here, the court stated that "Defendants here knew, because it was in the settlement agreement, that the class attorneys would seek to recover fees based on the entire $4.5 million fund. The Defendants had some responsibility to negotiate at the outset for a smaller settlement fund if they wished to limit the fees." *Id.*[9] We also note, as the district court recognized, that a

---

[9] While we fully agree that the district court has an independent supervisory duty to assess the appropriateness of the fee award apart from any agreement reached by plaintiff and defense counsel, *see Piambino v. Bailey*, 610 F.2d 1306, 1328 (5th Cir.1980) ("A district court is not bound by the agreement of the parties as to the amount of attorneys' fees."), we note that defense counsel's arguments about the "exorbitant and unprecedented fee Award," Brief for Defendants-Appellants, at 4, are in conflict with their earlier assertions to the district court. As the district court noted, at the time that the settlement agreement was presented to the court, the defense counsel fully supported, as "well within the range of reasonable", R132-1518-42, an award of 33 1/3% of the total settlement fund. The district court further noted that both parties supported "a fee award of one-third of the $40 million settlement fund, which everyone at the time clearly understood to be approximately $13 million," *id.* at 34, and emphasized "that in these discussions both sides went to some lengths to convince me that a settlement fund consisting of $40 million, albeit comprised of $10 million in cash and the balance in notes, less a fee award of one-third of the gross amount of the settlement fund and reimbursement of counsel's expenses, would produce an exceptional benefit to the class members." *Id.* at 35. Additionally, no class members opposed the amount of the attorneys' fee award. *See id.* at 63 (only class member to oppose portion of settlement stipulation at fairness hearing "was just angry at the

leading commentator on class actions has agreed that fee awards may be based on the total available fund:

> When a lump sum has been recovered for a class, that sum represents the common fund benchmark on which a reasonable fee will be based. When, however, the defendant reserves the right to recapture any unclaimed portion of the common fund after class members have had an opportunity to make their claims against the fund, . . . the question arises concerning whether the benchmark common fund amount for fee award purposes comprises only the amount claimed by class members or that amount potentially available to be claimed. In *Boeing Co. v. Van Gemert*, the Supreme Court settled this question by ruling that class counsel are entitled to a reasonable fee based on the funds potentially available to be claimed, regardless of the amount actually claimed. Herbert B. Newberg and Alba Conte, Newberg on Class Actions § 14.03, at 14-14 (3d ed.1992).[10]

In addition to the district court's careful consideration of the *Johnson* factors and awareness that the actual claims made

---

reversionary clause.").

[10] *See also In re Copley Pharmaceutical, Inc.*, 1 F.Supp.2d 1407 (D.Wyo.1998), where the district court approved, under *Boeing*, the payment of attorneys' fees from the gross settlement fund. "The first step in a percentage of the fund analysis is a determination of the value of the fund. While disputed by the parties in this case, the matter is settled by the explicit terms of the Agreement." *Id.* at 1412. The court further found that "this case involves a settlement negotiated at arms length, rather than a judgment. Under the terms of that settlement and its remittitur provisions, Defendant not only knew that class counsel would seek to recover fees based on the gross amount of the fund recovered (regardless of whether some part of that fund was not claimed), but also agreed to a mechanism and formula by which class counsel could do so. Thus Defendant cannot complain now that class counsel seek to do what the settlement agreement explicitly contemplates." *Id.* at 1416.

could be less than the gross settlement fund, our conclusion that the award is not an abuse of discretion is supported by the following observations. Unlike many other class actions, the total fund amount of $40 million was not illusory or meaningless. Each class claimant benefitted from having the total amount of the fund set at $40 million because the individual payment was based upon a percentage of the total fund. The amount of the total fund determined the amount of each class member's claim, regardless of the actual number of claims filed. In other words, as the district court explained:

> In relationship to the plan of allocation, the stipulation of settlement provides that each class member will recover from the net settlement fund in the same proportion that his or her losses bore to total customer losses. Therefore, the claim of any class member will not reduce or increase the recovery of any other class member except to the extent that the Court orders that bonuses be paid to the class representatives.

R132-1518-64. Defendants' counsel also noted that "each claimant's distribution does not depend on how many claims are submitted in this case." *Id.* at 145. The total fund awarded in the settlement, therefore, substantially and directly affected the amount that each claimant would eventually be awarded. The fact that there were a reduced number of claimants had no effect at all on the amount each class member received. That amount, rather, was determined by the total fund accrued. Negotiating a $40 million gross settlement fund, therefore, created a benefit on behalf of the entire class.[11]

---

[11] Defendants argue that the court should consider the policy behind the recently-enacted Private Securities Litigation Reform Act, ("PSLRA"), Pub.L. No. 106-67, 109 Stat. 737, 758, § 108, which specifies that attorneys' fee requests must be considered in light of the total benefit to plaintiffs. We decline to apply the policy of the PSLRA because it does not apply to actions commenced before and pending upon its effective date, December 22, 1995. Furthermore, it is likely that the PSLRA does not apply to commodities actions.

Moreover, even if we were to accept defendants' argument about the amount on which attorneys' fees should be based, the reversionary nature of the settlement necessarily would mean that 90% of the reduction in attorneys' fees would accrue to the benefit of the defendant, in contrast to the mere 10% which would accrue to the class' interest.[12] Defense counsel's claimed interest in protecting the class thus, seen in this light, strains credulity. Furthermore, while we have decided in this circuit that a lodestar calculation is not proper in common fund cases, we may refer to that figure for comparison. The plaintiffs' counsel's lodestar calculation would bring a fee of $12,663,897. *See* R32-1480, at ¶9. The $13.3 million awarded by the district court then would have only a modest lodestar multiplier of 1.05%.

Finally, the abuse of discretion standard has particular meaning in lawsuits that are as lengthy and contentious as the case at bar. This litigation has generated 134 volumes of record. Forty-eight witnesses testified at the trial alone. The district court is in the unique position to evaluate the labors of both parties in this litigation. Nothing in this opinion precludes a district court judge in a different case from basing the attorneys' fee award on the actual class recovery, or on the gross settlement figure. The factors the district court considers will vary according to the circumstances presented in each case. When we can discern no clear error of judgment by the court, however, there is no abuse of discretion.

II. EXPENSE AWARD

The defendants also challenge the district court's award of $2,400,204 in expenses to the plaintiffs' class counsel.

---

[12] Defendants calculate that the attorneys' fees should be $3,627,526, as opposed to the $13.3 million awarded by the district court. Brief of Defendants-Appellants, at 47 & n. 17. Of the additional $9.7 million that would accrue to the settlement fund from this calculated reduction in attorneys' fees, only $1,000,000 would be redistributed to the 20,000 potential claimants, while $8.7 million would revert to the defendants. *Id.*

R35-1543-2. Plaintiffs' lead counsel originally requested an expense award of $2,586,611.60, and co- counsel, $77,482.97, totaling $2,664,094.57. *See* R132-1518-94. While observing that Camden I did not provide guidance for determination of expenses, the district court recognized that "there is a requirement . . . on the part of class counsel to establish that the costs are reasonable and necessary . . . to the prosecution of the case." R132-1518-96. *See also In re "Agent Orange" Prod. Liab. Litig.*, 611 F.Supp. 1296, 1314 (E.D.N.Y.1985), *modified on other grounds*, 818 F.2d 226 (2d Cir.1987) ("Upon submission of adequate documentation, plaintiffs' attorneys are entitled to reimbursement of those reasonable and necessary out-of-pocket expenses incurred in the course of activities that benefitted the class."). The district court further recognized a "responsibility to scrutinize the costs for which reimbursement is requested in order to ensure that class counsel is not obtaining a secret or unintended profit." R132-1518-97.

After a March 31, 1997, hearing, the district court determined that lead counsel for the plaintiff class had failed to substantiate its cost application to the extent necessary for the court to make a determination as to whether the expenses were reasonable. From the co-counsel's costs, the district court disallowed "legal services" and "postal costs" and cut reproduction costs from 25 cents to 10 cents per page. *See* R132-1518-95.

At an April 25, 1997, status conference, the district court made final expense determinations in light of plaintiffs' counsel's supplements to the expense request, such as "additional computer print-outs, invoices and other documents, as well as affidavits explaining the law firm's billing procedures for out-of- pocket costs, and affidavits addressing the reasonableness of certain categories of expenses." R35-1542-2-3. The record reveals that the district court

conducted an exhaustive and detailed examination of each of plaintiff's counsel's claimed expenses. *See* R133-1535-4-16.[13]

We are convinced that the district court did not "rubber stamp" the submissions of the plaintiffs' class counsel for expenses, but rather required more specific documentation for costs, considered each type of expense separately, and eventually disallowed over $200,000 of the request. Rarely do class action litigations proceed to trial. The expense request in this case reflects seven years of litigation and a five-month trial. We see no abuse of discretion in the district court's expense award.

III. ASSIGNABILITY OF FEE AWARD

Under the original stipulation of settlement, plaintiffs' class counsel was to receive the entire sum of attorneys' fees and expenses in cash. The district court questioned this arrangement because the plaintiff class members were to receive only 25% of their claim in cash and the remaining 75% in the form of promissory notes. Responding to the district court's concern, plaintiffs' class counsel agreed to accept 25% cash and 75% in deferred obligation for their fee award. The terms of the deferred obligation are the source of the present controversy.

Defendants challenge the district court's determination that the promissory notes given to plaintiffs' class counsel are assignable. The stipulation of settlement provides that the portion of attorneys' fees "not paid in cash out of the cash portion of the Settlement Fund will be paid by the Settlement Administrator if, as and when the Settlement Administrator receives payments with respect to the Master Promissory Note, and the deferred portion of these fees and expenses will earn

---

[13] Among many other considerations, the district court eliminated costs for local meals, cabs, airline ticket upgrades, and other miscellaneous travel charges, *id.* at 6; approved telephone charges, *id.* at 4; and disallowed lobbyist fees and charges for a jury selection psychiatrist, *id.* at 9.

interest at the same rate and be paid at the same time as interest is earned and paid on the Master Promissory Note." R31-1371-55-56. Exhibit A to the stipulation agreement, a proposed order with respect to the class action settlement, signed by counsel for both parties, provides that "Counsel will request that the payment of fees and expenses out of the Settlement Fund be made in cash to the extent available. Any fee awarded which is not paid in cash shall be paid in the form of an obligation having the same terms and bearing the same interest rate as the Promissory Notes, as defined in the Stipulation." R31-1371, Exh. A, at 11. The stipulation provided that promissory notes given to class claimants were freely assignable. R31-1371-20. Under the terms of the proposed order, the deferred attorney's fees would be on equal terms with the class claimants' promissory notes and, therefore, assignable. Defendants argue that the language in the proposed order is a material alteration of the language in the stipulation of settlement. The proposed order, however, was attached to the stipulation agreement as an exhibit. Under the terms of the stipulation agreement, "[a]ll of the Exhibits to the Stipulation . . . are fully incorporated herein by this reference." *Id.* at 66, s 10.5.

Furthermore, as the district court noted, "[n]owhere in the January 31, 1997 Order or the Stipulation of Settlement is it specifically provided that the deferred obligation to class counsel shall not be assignable or transferable." R33-1515-2-3. As a result, the more detailed language of the proposed order does not materially alter the silence of the stipulation of settlement. Moreover, under Florida law, in accordance with which the settlement agreement is to be governed, "[g]enerally, all contractual rights are assignable unless the contract prohibits assignment, the contract involves obligations of a personal nature, or public policy dictates against assignment." *L.V. McClendon Kennels, Inc. v. Investment Corp.*, 490 So.2d 1374, 1375 (Fla. Dist. Ct. App. 1986). Since there is no language in the stipulation of settlement or proposed order prohibiting

assignment, we find that the district court properly determined the notes are assignable.

IV. CONCLUSION

We find that the district court did not abuse its discretion in awarding attorneys' fees and expenses to plaintiffs' class counsel. We also affirm the district court's order that the portion of attorneys' fee to be paid in promissory notes is assignable. Nothing in this opinion should be interpreted to minimize the importance of the active supervisory role of the district court when reviewing class action settlements, particularly those involving the so-called "clear sailing" agreements. The district court here, however, did not abuse its discretion in making an attorneys' fee award. The court considered, and applied, all the relevant Eleventh Circuit precedent. Defense counsel, having reaped the benefits of their bargain in settling the class action suit, cannot expect the court to renegotiate on their behalf the terms of an agreement concluded after arms-length negotiations.

AFFIRMED.

APPENDIX B

Order with respect to Notice, Settlement Hearing and Administration of Class Action Settlement, signed by Judge Ungaro-Benages on January 31, 1997 (United States District Court for the Southern District of Florida)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIAM WATERS and LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated, Plaintiff, -against- INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., et al., Defendants.	Case No. 90-6863 Civ-UNGARO- BENAGES

ORDER WITH RESPECT TO NOTICE, SETTLEMENT HEARING AND ADMINISTRATION OF CLASS ACTION SETTLEMENT

Upon review and consideration of the Stipulation of Settlement dated January 17, 1997 and the exhibits annexed thereto or incorporated therein (the "Stipulation"), executed on behalf of the Representative Plaintiffs, William Waters and Linda Batholomew, (on behalf of themselves and each of the Settlement Class Members), and Defendants International Precious Metals Corporation, MustiVest, Inc., Multi Vest Real Estate, Inc., S.S. Melbourne Inc., the Cypress Group, Inc., and a certain Individual Defendant described in the Stipulation.

NOW, upon the application of Plaintiffs and the Defendants, it is hereby ORDERED as follows:

1. The terms of the Stipulation and the Settlement and releases provided for therein, are preliminarily approved as fair, reasonable and adequate.

2. The definitions set forth in the Stipulation are hereby incorporated into this Order.

3. The following class was certified, pursuant to Rule 23 of the Federal Rules of Civil Procedure on June 22, 1993. The class represented by Plaintiffs Waters and Bartholomew ("the Settlement Class") consists of all persons who opened customer accounts at MultiVest Options, Inc. (hereinafter including its predecessor, IPMC Options, Ltd.) and traded exchange traded options at any time during the period from June 1, 1985 through October 31, 1989, in conformity with the Court's Order of June 22, 1993 defining the class in this litigation and as more particularly identified in Plaintiffs' Updates to Defendants' Submissions A&B to the court's Order of August 12, 1996. Excluded from the Settlement Class are Defendants, members of the immediate family of any individual Defendant, any entity in which any Defendant has or had a controlling interest, current and former directors, officers and employees of any of the Defendants, and the legal representatives, heirs, successors or assigns of any such excluded person or entity; those Persons who timely and validly requested exclusion from the plaintiffs' class pursuant to the "Notice of Pendency and Settlement of Class Action" previously sent to the plaintiff class; persons whose accounts at MultiVest options, Inc. had a net profit; and persons who have executed valid releases of MultiVest Options, Inc. and affiliated entities. The Settlement Class includes the claims asserted by persons who are otherwise Settlement Class Members who filed claims in the Commodities Futures Trading Commission Receivership for MultiVest Options, Inc.

4. The Defendants shall, at their expense, furnish to the Settlement Administrator the names and addresses of all readily identifiable Settlement Class Members as of the date of this

order. The Settlement Administrator or his duly designated representative shall cause notice of the Stipulation and the Settlement Hearing to be given to Settlement Class Members as follows:

(a) A copy of the Notice of Proposed Settlement of Class Action, Settlement Hearing, and Right to Appear (the "Notice"), substantially in the form attached to the Stipulation as Exhibit A-1, which shall include a description of the general terms of the Settlement; and the Proof of Claim and Release, substantially in the form annexed hereto as Exhibit A-3, shall be mailed by first-class mail to all Settlement Class Members appearing on the records provided by Defendants to the Settlement Administrator or his designee.

(b) At approximately the same time as the initial mailing of the Notice, a copy of the Summary Notice substantially in the form annexed to the Stipulation as Exhibit A-2 shall be published once in the national editions of the New York Times, The Wall Street Journal and USA Today.

5. The Settlement Administrator shall pay the costs and expenses reasonably incurred in connection with providing notice to the Settlement Class, soliciting the filing of Proof of Claim and Release forms, locating members of the Settlement Class including forwarding addresses to the extent reasonably obtainable, administering and distributing the Settlement Fund to Authorized Claimants, processing Proof of Claim and Release forms and paying escrow fees and costs if any out of the Settlement Fund. The Settlement Administrator may contract with an outside service provider to obtain these services.

6. The Settlement Administrator shall be permitted to withdraw funds from the Settlement Fund to pay any costs described above in paragraph 5 without prior approval of the Court or any of the other signatories to the Stipulation.

7. At or prior to the hearing described in paragraph 14, the Settlement Administrator shall cause to be filed with the Clerk of the Court proof of mailing and publication of the Notice and Summary Notice, respectively, in conformity with this Order.

8. The Court approves the form of Notice, Proof of Claim and Release and Summary Notice and finds that the Notice is in compliance with provisions set forth paragraph 4 above, is hereby found to be the best notice practicable under the circumstances, and constitutes due and sufficient notice of the Settlement Hearing and proposed Settlement to all persons affected by and/or entitled to participate in the Settlement, in full compliance with the notice requirements of Rule 23 of the Federal Rules of Civil Procedure.

9. The Settlement Administrator shall lease and maintain a post office box of adequate size for the return of Proofs of Claim and Release. All Notices to the Classes shall designate said post office box as the return address for Proofs of Claim and Release. The Settlement Administrator shall be responsible for the receipt of all responses from the Settlement Class Members and shall preserve all entries of appearance, Proofs of Claim and Release, and any and all other written communications from the Settlement Class Members, or any other person in response to said notice for one year after the distribution to Settlement Class Members. All written communications received from the Settlement Class Members and all written responses to inquires by the Settlement Class members relating to this Stipulation and Settlement shall be available at all reasonable times for inspection and copying by Plaintiffs' Settlement Counsel and counsel for the Defendants, subject to further order of the Court if issues of privilege or confidentiality arise.

10. (a) The Defendants and the Settlement Administrator agree to treat the Settlement Fund so being at all times a "qualified settlement fund" within the meaning of Treas. Reg.

Section 1.468B-1. In addition, the Settlement Administrator and, as required, the defendants shall jointly and timely make such elections as necessary or advisable to carry out the provisions of this § 11, including the "relation-back election" (as defined in Treas. Reg. Section 1.468B-1) back to the earliest permitted date. Such elections shall be made in compliance with the procedure and requirements contained in such regulations. It shall be the responsibility of the Settlement Administrator to timely and properly prepare, and deliver the necessary documentation for signature by all necessary parties, and thereafter to cause the appropriate filing to occur.

(b) For the purpose of Section 468B of the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder, the "administrator" shall be the Settlement Administrator. The Settlement Administrator shall timely and properly file all informational and other tax returns necessary or advisable with respect to the Settlement Fund (including without limitation the returns described in Treas. Reg. Section 1.468B-2(K). Such returns (as well as the election described in §10(a) shall be consistent with this §10 and in all events shall reflect that all taxes (including any interest or penalties) on the income earned by the Settlement Fund shall be paid out of the Settlement Fund as provided in §10(c) hereof.

(c) All (a) taxes (including any interest or penalties) arising with respect to the income earned by the Settlement Fund, including any taxes or tax detriments that may be imposed upon the Defendants with respect to any income earned by the Settlement Fund for any period during which the Settlement Fund does not qualify as a "qualified settlement fund" for Federal or state income tax purposes ("Taxes") and (b) expenses and costs incurred in connection with the operation and implementation of this § 10 (including, without limitation, expenses of tax attorneys and/or accountants and mailing and distribution costs and expenses relating to filing (or failing to file) the returns described in this § 10) ("Tax

Expenses"), shall be paid out of the Settlement Fund. The Settlement Administrator shall indemnify and hold Defendants harmless for Taxes and Tax Expenses (including, without limitation, taxes payable by reason of any such indemnification). Further, Taxes and Tax Expenses shall be treated as and considered to be, a cost of administration of the Settlement and shall be timely paid by the Settlement Administrator out of the Settlement Fund without prior order from the Court and the Settlement Administrator shall be obligated (notwithstanding anything herein to the contrary) to withhold from distribution to class members any funds necessary to pay such amounts including the establishment of adequate reserves for any Taxes and Tax Expenses (as well as any amounts that may be required to be withheld under Treas. Reg. Section 1.468B-2(1)(2)). The parties hereto agree to cooperate with the Settlement Administrator, each other, and their tax attorneys and accountants to the extent reasonably necessary to carry out all of the foregoing provisions.

11. In order to be deemed an Authorized Claimant entitled to participate in the Net Settlement Funds, in the event the Settlement is effected in accordance with all of the terms and conditions thereof, Settlement Class Members shall take the following actions and be subject to the following conditions:

(a) A properly executed and verified Proof of Claim and Release must be submitted at the post office box indicated in the Notice and in the manner described in the Notice on or before April 16, 1997, together with all of the Settlement Class Member's Monthly Statements from MultiVest Options Inc. (hereinafter including its predecessor, IPMC Options, Ltd.) Upon demand by a Claimant, the Settlement Administrator shall provide copies of the Claimant's Monthly Statements from MultiVest Options Inc. The provisions of such information shall not relieve Claimants of their obligation to submit a properly completed Proof of Claim and Release together with their Monthly Statements. Class

Members may request copies of their Monthly Statements from the Settlement Administrator and shall be subject to a total charge of $50 for the Settlement Administrator providing such statements which charge shall be deducted from any distribution. Proofs of Claim and Release sent by mail shall be deemed submitted when postmarked if mailed by first class, registered or certified mail, postage prepaid, addressed in accordance with the instructions in the Proof of Claim and Release form. All other Proofs of Claim and Release shall be deemed submitted at the time of actual receipt. Every Settlement Class Member who files a Proof of Claim and Release shall thereby submit himself or herself or itself to the jurisdiction of the Court. The Settlement Administrator shall review all timely submitted Proofs of Claim and Release and Monthly Statements and make such corrections to the Proofs of Claim and Releases as may be required to ensure they accurately reflect the information contained in such Claimant's Monthly Statements.

(b) As part of each Claimant's Proof of Claim and Release, each Claimant shall (subject to effectuation of the Settlement) release all claims as provided in the Stipulation. however, failure to file this Release shall not affect the validity of the Release set forth in the Stipulation, or that will be incorporated into the Court's Final Order and Judgment, which shall bind all Settlement Class Members except those who have heretofore been excluded by timely filing a Request for Exclusion.

(c) Any Settlement Class Member who does not timely file a Proof of Claim and Release, unless otherwise ordered by the Court, shall not be entitled to any share in the Settlement Fund, but shall nonetheless be bound by the Court's judgment in this matter and enjoined from asserting any of the claims asserted in, or that could have been asserted in, the Litigation unless they have heretofore properly excluded themselves from the plaintiff class.

12. Plaintiffs' Settlement Counsel and Plaintiffs' Class Counsel of Record will apply for an award of fees and expenses ("Fee and Expense Award") to be considered by the Court at the Settlement Hearing. Counsel's fee application will not exceed 33⅓% of the Settlement Fund plus expenses. Counsel will request that the payment of fees and expenses out of the Settlement Fund be made in cash to the extent available. Any fee awarded which is not paid in cash shall be paid in the form of an obligation having the same terms and bearing the same interest rate as the Promissory Notes as defined in the Stipulation. Defendants will not oppose plaintiffs' counsel's application for a Fee and Expense Award.

13. Plaintiffs' Settlement Counsel shall allocate the attorneys' fees among counsel for Representative Plaintiffs within their discretion, in a manner which they in good faith believe reflects the contributions of such counsel to the prosecution and settlement of the Litigation.

14. A hearing (the "Settlement Hearing") shall be held before the Hon. Ursual Ungar-Benages at 9:30 a.m. on March 31, 1997 in the United State District Court for the Southern District of Florida, to determine whether the proposed Settlement of the Litigation on the terms and conditions provided for in the Stipulation are fair, reasonable and adequate, whether the Settlement should be approved by the Court, whether to approve counsel's application for the Fee and Expense Award described in paragraph 12 and whether the Final Order and Judgment of dismissal of Litigation in the form of Exhibit B to the Stipulation should be entered. This hearing may be postponed, adjourned or continued by Order of the Court without further notice to Plaintiffs and the Classes.

15. Any Settlement Class Member may appear at the Settlement Hearing in person or by counsel, if an appearance is filed and served as hereinafter provided, and may be heard to the extent allowed by the Court in support of, or in opposition to, the fairness, reasonableness and adequacy of the proposed

Settlement and, any award of attorneys' fees and reimbursement of expenses; provided, however, that no person shall be heard in opposition to the proposed Settlement and, if approved, the judgment entered thereon, or to the award of attorneys' fees and reimbursement of expenses, and no papers or briefs submitted by any person shall be accepted or considered by the Court unless, on or before March 17, 1997, such person: (a) has filed with the Clerk of the Court a notice of such person's intention to appear together with a statement that indicates the basis for such opposition along with any supporting documentation, and (b) has served copies of such notice, statement, and documentation together with copies of any other papers or briefs which such person seeks to file with the Court, either in person or by mail, upon Plaintiffs' Settlement Counsel, John L. Cooper; Farella Braun & Martel; 235 Montgomery Street, San Francisco, CA 94104, and upon Defendants' Counsel, Martin I. Kaminsky, Pollack & Kaminsky; 114 W. 47th Street, New York, NY 10036.

16. Upon consummation and approval of the Settlement provided for in the Stipulation, the Stipulation, and each and every term and provision thereof, shall be deemed incorporated herein as if explicitly set forth and shall have the full force and effect of an Order of this Court.

17. If the Settlement is terminated for any reason whatsoever all funds in the Settlement Fund, less amounts necessary to pay costs appropriately incurred but not yet paid, shall be returned to Defendants within five (5) business days of such termination as determined by the Court and, the Settlement and all proceedings had in connection therewith shall be without prejudice to the status quo ante rights of the parties to the action, and all Orders issued pursuant to the Settlement shall be vacated. In such an event, the Settlement and all negotiations concerning it, shall not be used or referred

to for any purpose whatsoever and the litigation shall be set for retrial before this Court as soon as practicable.

Dated: [Jan.31], 1997

APPENDIX C

Final Order and Judgment Approving Settlement,
filed April 2, 1997
(United States District Court for the
Southern District of Florida)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

WILLIAM WATERS and LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated, Plaintiffs, vs. INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, Individually and as Trustee of the Jason Grosfeld Trust, MULTIVEST REAL ESTATE, INC., S.S. MELBOURNE, INC., and THE CYPRESS GROUP, INC., Defendants.	CASE NO. 90-6863 CIV-UNGARO-BENAGES

FINAL ORDER AND JUDGMENT APPROVING SETTLEMENT

The parties to this Litigation, having executed and filed the Stipulation of Settlement dated as of January 17, 1997 and later amended through January 31, 1997 (the "Stipulation"), the definitions of which the Court incorporates by reference herein; the Court having entered its Order thereof dated January 31, 1997, directing the notice of the proposed Settlement of the Litigation be mailed to all members of the Settlement Class and scheduling a hearing to determine whether the proposed settlement including the award of attorneys' fees, expenses and costs should be approved as fair, reasonable and adequate; said

notice having been given, a hearing having been held on March 31, 1997, at which all interested persons were given an opportunity to be heard; and the Court having read and considered all submissions in connection with the proposed settlement, and having reviewed and considered the files and records herein, the Court finds and concludes that:

Stipulations of dismissals with prejudice will be entered into by all parties to this case and will be filed in the United States District Court, Southern District of Florida in accordance with the Stipulation.

On January 31, 1997, an Order with respect to Notice, the Settlement Hearing and the Administration of the Class Action was entered by this Court directing that Notice be given to the Settlement Class of the proposed Settlement, of a hearing to determine whether the proposed Settlement should be approved as fair, adequate, and reasonable, to award fees and expense reimbursements to Plaintiffs' Settlement Counsel and Counsel for the representative Plaintiffs, as well as to consider any objections thereto. Such a hearing was held, as noticed, on March 31, 1997. Prior to the Settlement Hearing, proof of Notice, as directed in said Order, was presented and filed. Members of the Settlement Class were notified of their right to appear at the hearing in support of or in opposition to the proposed Settlement, award of fees, and reimbursement of expenses.

The Court having heard plaintiffs' Settlement Counsel and counsel for the Defendants and having reviewed all of the submissions presented with respect to the proposed Settlement, including such objections as have been asserted by members of the Settlement Class, and the Court having determined that the Settlement is fair, adequate, and reasonable, and having considered the Petition of Plaintiffs' Settlement Counsel and Plaintiffs' Class Counsel of Record for awards of fees and expense reimbursements, and having reviewed the affidavits,

schedules, and exhibits submitted in support thereof and determining that there is no just reason for delay, it is hereby

ORDERED, ADJUDGED, AND DECREED THAT:

1. The Court has subject matter jurisdiction over this action.

2. Notice to the Settlement Class required by Rules 23(c) and (e) of the Federal Rules of Civil Procedure has been given in an adequate and sufficient manner, constituting the best notice practicable, complying in all respects with such rules and due process, including, but not limited to, the forms of notice and the methods of identifying and giving notice to the Settlement Class Members.

3. The Members of the Settlement Class are as described in the Stipulation.

4. The proposed Stipulation is in all respects fair, adequate, reasonable, and proper, and in the best interests of the Settlement Class Members and is approved as modified by this Order.

5. The Plan of Allocation of the Net Settlement Amount as set forth in the Notice and Stipulation is hereby approved as modified by this Order.

6. Plaintiffs, Settlement Class Members through Plaintiffs' Settlement Counsel, and Defendants shall consummate the Settlement according to the terms of the Stipulation as modified by this order.

7. All Settlement Class Members are permanently barred and enjoined, absolutely and forever, from suing upon or asserting any of the Released Claims against any of the Defendants, either directly, individually, or in a representative or derivative capacity, or against any of the other Related Persons as defined in the Stipulation.

8. This Litigation is dismissed with prejudice and on the merits as to the Defendants and without award of court costs. Judgment dismissing the claims against the defendants shall be entered and all Released Claims as defined in the Stipulation, as hereby extinguished.

9. Each of the Released Persons, as defined in the Stipulation, are discharged, dismissed, and released from and with respect to all released Claims including Unknown Claims as defined in the Stipulation, whether class or individual, whether in law or equity, whether based on federal or state law, whether based on events or actions occurring prior to or on the Effective Date, which representative Plaintiffs, or any members of the Settlement Class ever had, now have, or may hereafter have against any of the Defendants or Released Persons.

10. Each and every Defendant is deemed to have released and discharged each and every other Defendant of any claim by Settlement Class Members of any claim asserted in this Litigation, of any Defendant's potential liability to the Settlement Class Members, or of any claim for indemnification or contribution or any other such claim arising out of the aforesaid claims and each and every Defendant is hereby barred and enjoined from suing upon or otherwise asserting any such claim against any other Defendant.

11. Jurisdiction is hereby retained as to all matters related to administration and consummation of the Settlement hereby approved, the processing and allowance of claims against-the-Settlement Fund, the distribution thereof to Settlement Class Members and the continuing administration thereof until the various obligations comprising the Settlement Fund are paid in full.

12. Neither this final order and Judgment nor the Stipulation is an admission or concession by any Defendants of any actual or potential fault, omission, liability, or wrongdoing. This Final Order and Judgement is not a finding of the validity

or invalidity of any claims in the Litigation or of any wrongdoing by any of the parties. Neither this Final Order and Judgment nor the Stipulation or the fact of Settlement, nor the Settlement negotiations, nor any related document shall be used as an admission of any actual or potential fault or omission by any person or be offered or received in evidence as an admission, concession, presumption, or inference against any party in any proceeding or an accurate measure of damages, other than such proceedings as may be necessary to consummate or enforce the Stipulation except that Defendants may file the stipulation and this Final Order and Judgement in any action brought against them in order to support their defense therein including, without limitation any defense or counterclaim based on principles of res judicata, collateral estoppel, release, good faith settlement, judgment bar or reduction on any other theory of claim preclusion or issue preclusion or similar defenses or counterclaims.

13. With respect to the allocation of cash and Promissory Notes to be paid to Authorized Claimants, the Authorized Claimants shall be paid in cash from the Net Settlement Fund to the extent of cash from the cash portion of the Settlement Fund remaining after the payment of expenses of the Administrator of the Settlement Fund as described in §6.2 of the Stipulation, including the portion of the Fee and Expense Award which is by this order ordered to be paid in cash, with the remaining amounts owed to each Authorized Claimant to be paid in the form of the individual Promissory Notes contemplated by the Stipulation.

14. Plaintiffs' Class Counsel is hereby awarded $13,333,333 in fees (one-third of the $40 million Settlement Fund) and the Court further awards the law firm of Raring & Lipoff costs in the amount of $74,404. The Court also currently awards the law firm of Farella Braun & Martel LLP ("FBM") costs in the amount of $141,519. The total of this current Fee and Expense Award ("The Fee and Expense Award") is therefor $13,534,256. The Fee and Expenses

Award is an obligation of the Settlement Class Members (and not of Defendants) and is payable by the Settlement Administrator on behalf of the Settlement Class Members out of the Settlement Fund. The Fee and Expense Award is payable as follows and otherwise in accordance with the terms of the Stipulation:

(a) The Fee and Expense Award shall be paid $5,000,000, in cash in accordance with Section 7.2 of the Stipulation, and the balance, as a deferred obligation of the Settlement Class Members in accordance with Section 7.1 and the other provisions of the Stipulation. (The deferred obligation together with the interest thereon is referred to as the **"Deferred Amount"**).

(b) The interest of any of Plaintiffs' Settlement Counsel and Plaintiffs' Class Counsel in the Fee and Expense Award and/or Deferred Amount may be pledged, hypothecated or otherwise transferred in whole or in part, including to any one or more heirs, successors, assigns, financial institutions or other persons.

(c) The Settlement Administrator will pay the Deferred Amount to the two law firms comprising Plaintiff's Class Counsel in the ratio directed in writing by the Plaintiff's Class Counsel or to such law firms' respective successors and assigns. The Settlement Administrator will directly pay each firm's share of the Deferred Amount by wire transfer to the bank account or accounts designated by that recipient on the day on which note Proceeds have been received by the Settlement Administrator, if Note Proceeds are received by it by 11:00 a.m. (New York City time) on a business day, otherwise on the immediately following business day.

(d) To the extent, that the cash portion of the Settlement Fund is not actually paid to Authorized Claimants or used to pay expenses of the administration of the Settlement Fund as described in §6.2 of the Stipulation, this cash portion of the Settlement Fund and interest earned thereon will be used to

promptly pay down the Deferred Amount owed to the Plaintiffs' Class Counsel.

15. The amount of the Irrevocable Letter of Credit securing the Promissory Notes and the Master Promissory Note will not be reduced below the amount provided in the Stipulation. The Settlement Administrator will at the times at which the Irrevocable Letter of Credit is renewed or extended verify that, if the issuing or renewed bank is not NBD Bank, the bank has a long-term unsecured credit rating equal to or higher than the credit rating of Aa3 from Moody's Investor Services, AA- from Standard & Poor's Ratings Group.

16. The class representatives William Waters and Linda Bartholomew shall each receive a bonus of $10,000 in addition to amounts otherwise recoverable under the Stipulation. This bonus will be payable as $2,500 in cash and $7,500 in additional individual Promissory Notes for each of them.

17. The Settlement Administrator is ordered to promptly mail written notice to each Settlement Class Member whose initially mailed notice was returned undelivered to the Settlement Administrator to the extent that new addresses are found for those Settlement Class Members as a result of the new addresses obtained by the Settlement Administrator from the efforts of Credit Bureau Information Services, Inc. and Class Action Locator Services of San Rafael, California, advising that each such Settlement Class Member shall have sixty (60) days from the mailing of this notice within which to submit their Proof of Claim and Release Form to the Settlement Administrator, notwithstanding anything to the contrary in any prior published notice or the Proof of Claim and Release Form or otherwise. The final date for these Settlement Class Members to submit their proof of Claim and Release Forms is hereby ordered extended to a date which is sixty (60) days from the date of mailing of this notice, notwithstanding any prior order of this Court.

Notwithstanding anything in the Stipulation. The Settlement Administrator shall periodically submit its reasonable fees and expenses to the Court for approval prior to payment from the Settlement Fund.

(a) The Defendants and the Settlement Administrator agree to treat the Settlement Fund as being at all times a "qualified settlement fund" within the meaning of Treas. Reg. Section 1.468B-1. In addition, the Settlement Administrator and, as required, the Defendants shall jointly and timely make such elections as necessary or advisable to carry out the provisions of this section, including the "relation-back election" (as defined in Treas. Reg. Section 1.468B-1) back to the earliest permitted date. Such elections shall be made in compliance with the procedures and requirements contained in such regulations. It shall be the responsibility of the Settlement Administrator to timely and properly prepare and deliver the necessary documentation for signature by all necessary parties, and thereafter to cause the appropriate filing to occur.

(b) For the purpose of Section 468B of the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder, the "administrator" shall be the Settlement Administrator. The Settlement Administrator shall timely and properly file all informational and other tax returns necessary or advisable with respect to the Settlement Fund (including without limitation the returns described in Treas. Reg. Section 1.468B-2(K)). Such returns (as well as the election described in ¶18(a)) shall be consistent with this section and in all events shall reflect that all taxes (including any interest or penalties) on the income earned by the Settlement Fund shall be paid out of the Settlement Fund as provided in §18(c) hereof.

(c) All (1) taxes (including any interest or penalties) arising with respect to the income earned by the Settlement Fund, including any taxes or tax detriments that may be imposed upon the Defendants with respect to any income

earned by the Settlement Fund for any period during which the Settlement Fund does not qualify as a "qualified settlement fund" for Federal or state income tax purposes ("Taxes") and (2) expenses and costs incurred in connection with the operation and implementation of this §18 (including, without limitation, expenses of tax attorneys and/or accountants and mailing and distribution costs and expenses relating to filing (or failing to file) and returns described in this §18) ("Tax Expenses"), shall be paid out of the Settlement Fund. The Settlement Administrator shall indemnify and hold Defendants harmless for taxes and Tax Expenses (including, without limitation, taxes payable by reason of any such indemnification). Further, Taxes and Tax Expenses shall be treated as and considered to be, a cost of administration of the settlement and shall be timely paid by the Settlement Administrator out of the Settlement Fund without prior order from the Court and the Settlement Administrator shall be obligated (notwithstanding anything herein to the contrary) to withhold from distribution to class members any funds necessary to pay such amounts including the establishment of adequate reserves for any Taxes and Tax Expenses (as well as any amounts that may be required to be withheld under Treas. Reg. Section 1.468B-2(1)(2). The parties hereto agree to cooperate with the Settlement Administrator, each other, and their tax attorneys and accountants to the extent reasonably necessary to carry out the provisions of this section.

19. In the event that the conditions to the Settlement set forth in the Stipulation are not satisfied and this Settlement is terminated pursuant to the terms of the Stipulation for any reason, then this Final Order and Judgment shall, upon further order of the Court, be rendered null and void and be vacated, and the Stipulation of Settlement and all orders entered in connection therewith shall be rendered null and void.

DONE and ORDERED in Chambers, at Miami, Florida this [2] day of April, 1997.

APPENDIX D

Amendment to Final Order and Judgment Approving Settlement, filed May 8, 1997 (United States District Court for the Southern District of Florida)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

WILLIAM WATERS AND LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated, Plaintiffs, vs. INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, individually and as Trustee of the Jason Grosfeld Trust, MULTIVEST REAL ESTATE, INC., S.S. MELBOURNE, INC., and THE CYPRESS GROUP, INC., Defendants.	CASE NO. 90-6863-CIV-UNGARO-BENAGES

AMENDMENT TO
FINAL ORDER AND JUDGMENT
APPROVING SETTLEMENT

Plaintiffs' counsel having filed a motion to alter or amend this Court's "Final Order and Judgment Approving Settlement," dated April 2, 1997 (hereinafter "April 2, 1997 Order"); and the Court having considered the matter and having found good cause therefor, IT IS HEREBY ORDERED that plaintiffs' counsel's motion IS GRANTED IN PART.

The Court HEREBY AMENDS the April 2, 1997 Order as follows:

The Court hereby STRIKES from page 5 of the April 2, 1997 Order that portion of paragraph 14 that previously read as follows:

> 14. Plaintiffs' Class Counsel is hereby awarded $13,333,333 in fees (one-third of the $40 million Settlement Fund) and the Court further awards the law firm of Raring & Lipoff costs in the amount of $74,404. The Court also currently awards the law firm of Farella Braun & Martel LLP ("FBM") costs in the amount of $141,519. The total of this current Fee and Expense Award ("The Fee and Expense Award") is therefor $13,534,256. The Fee and Expenses Award is an obligation of the Settlement Class Members (and not of Defendants) and is payable by the Settlement Administrator on behalf of the Settlement Class Members out of the Settlement Fund. The Fee and Expense Award is payable as follows and otherwise in accordance with the terms of the Stipulation.

In place of that one paragraph which is now stricken, the Court SUBSTITUTES the following:

> 14. Plaintiffs' Class Counsel is hereby awarded $13,333,333 in fees (one-third of the $40 million Settlement Fund) and the Court further awards the law firm of Raring & Lipoff costs in the amount of $74,404. The Court also awards the law firm of Farella Braun & Martel LLP ("FBM") costs in the amount of $2,325,800.77. The total of this Fee and Expense Award ("The Fee and Expense Award") is therefor $15,733,537.77. The Fee and Expense Award is an obligation of the Settlement Class Members (and not of Defendants) and is payable by the Settlement Administrator on behalf of the Settlement Class Members out of the Settlement Fund. The Fee and Expense Award is payable as follows and otherwise in accordance with the terms of the Stipulation. Other than the substitution of the

one paragraph set forth above, the Court's April 2, 1997 Order remains unchanged and in full force and effect.

DONE and ORDERED in Chambers, at Miami, Florida, this [8] day of May, 1997.

APPENDIX E

Order Granting in part Motion of Plaintiffs' Class Counsel to Alter or Amend Judgment with respect to Cost Award, signed May 8, 1997 (United States District Court for the Southern District of Florida)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

WILLIAM WATERS, LINDA BARTHOLOMEW, et al., Plaintiffs, vs. INTERNATIONAL PRECIOUS METALS CORP., INC., et al., Defendants.	CASE No. 90-6863-CIV- UNGARO- BENAGES

ORDER GRANTING IN PART MOTION OF PLAINTIFFS' CLASS COUNSEL TO ALTER OR AMEND JUDGMENT WITH RESPECT TO COST AWARD

THIS CAUSE is before the Court upon the Motion of Plaintiffs' Class Counsel to alter or Amend the Final Judgment entered by this Court on April 2, 1997, filed April 4, 1997 (D.E. 1517) with Memorandum in Support filed April 21, 1997. The Motion requests that the Court amend the Final Judgment to include all of the costs incurred by Plaintiffs' class counsel in this action which should be reimbursed to Plaintiffs' class counsel from the Settlement Fund.

By way of background, the pending motion was necessitated by the Court's ruling at the Fairness Hearing on March 31, 1997 that Farella, Braun and Martel, lead counsel for the plaintiff class, had failed to substantiate its cost application to an extent that the undersigned was unable to make an informed judgment respecting whether most of the amounts claimed were reasonable and appropriately reimbursable from the Settlement Fund. Thus, of the $2,571,611 requested by the

Farella, Braun & Martel at the Fairness Hearing, the Court directed that the Final Judgment only award the following costs:

Witness Fees:	$ 3,020.13
Service of Process:	1,383.26
Special Master Fees:	86,503.88
Rental & Storage Costs:	15,611.80
Court Reporter Costs:	20,000.00
Total:	$126,519.07

The Court also stated at the Fairness Hearing that it was awarding an additional $15,000 to class counsel against costs incurred since entry of the order giving preliminary approval to the settlement. However, due to a typographical error in the Final Judgment, which was entered on April 2, 1997, the $15,000 awarded for future expenses was omitted. The undersigned also notes that at the Fairness Hearing she awarded $74,404.00 for costs incurred by the law firm of Raring & Lipoff, co-counsel for the plaintiff class.

At the Fairness Hearing, the undersigned also invited Farella, Braun and Martel to file a timely motion to amend the Final Judgment to seek reimbursement of the balance of the costs with adequate supporting documentation. Accordingly, on April 21, 1997 Farella, Braun and Martel filed the pending motion to amend and supplemented the back-up for its original costs application with additional computer print-outs, invoices and other documents, as well as affidavits explaining the law firm's billing procedures for out-of-pocket costs, and affidavits addressing the reasonableness of certain categories of expenses.[14] In addition, Farella, Braun and Martel requested,

[14] Plaintiffs' counsel also pointed out the typographical error in the Final Judgment Order with respect to the amount of costs awarded to the Farella, Braun and Martel firm.

as part of the motion to amend, that the Court award additional costs which the firm had incurred since the Fairness Hearing. These additional costs were supported by the affidavit of Judy Craig and further back-up documentation.

The Court held a hearing on Plaintiffs' motion to amend on April 25, 1997. For the reasons stated on the record at the April 25, 1997 hearing on the motion to amend, the undersigned was satisfied that the cost application, as amended, had been substantiated to the degree necessary to allow the Court to assess the reasonableness of the amounts requested, with respect to all categories of costs other than the fees and costs of Zuckerman Spaeder, Plaintiffs' local counsel. Further, as explained at the hearing, the undersigned, after reviewing the request for additional costs, was also able to determine the extent to which the additional costs should be reimbursed, subject to certain adjustments which the Court ordered class counsel to make. Therefore, of the total costs of $2,816,636 then requested by the Farella, Braun & Martel over and above the $126,519 previously awarded to the firm in the Final Judgment, the undersigned ruled that the reasonable, reimbursable costs consisted of the following:

Telephone:	$33,392.69
Duplicating:	304,342.08
Microfilm:	47,784.09
Facsimile:	39,724.11
Court Reporter[15]:	180,434.21
Computerized Research:	307,209.97
Postage/Delivery Charges:	90,294.61

[15] The Court notes that this amount is over and above the $20,000 previously awarded for expenses related to Court Reporter services in the April 2 Order. The Court also notes that class counsel has pointed out an error in the transcript of the April 25, 1997 hearing which states that the Court was awarding a total of $204,434.21 in expenses related to court Reporter services. The correct amount should have been $200,434.21.

Travel:	274,820.56
Secretarial Word Processing:	148,613.21
Supplies:	39,561.29
Other Miscellaneous:	7,473.29
Document Imaging[16]:	6,410.85
Expert Witness & Consultant Fees:	385,262.32
Fees to Local Counsel:	23,427.02
Other Attorneys:	19,606.01
Mediator:	8,695.43
Other Consultants and Investigators:	160,510.43
Miscellaneous Charges:	411.30
Costs Incurred/Realized since 2/21/97[17]:	63,633.82
Total:	2,141,607.29

[16] The Court notes that at the April 25 Hearing on the Motion to Amend, the Court inadvertently failed to mention the amount of the document imaging costs, although the Court informed the parties that the total amount requested for such costs was reasonable.

[17] This amount includes those costs detailed in the Affidavit of Judy Craig submitted as part of the April 21 Memorandum in Support of the Motion to Amend. Although class counsel initially requested $72,018.49, class counsel subsequently backed out that the portion related to these types of costs previously disallowed by the Court. The Court points out that class counsel has also requested an additional $11,721.67 incurred or realized subsequent to the filing of Ms. Craig's Affidavit and detailed in the declaration of Paul B. Duncan accompanying Plaintiffs' May 1, 1997 Notice of Filing Proposed Orders. The Court declines to award these costs, and the Court will not entertain further applications for future costs. This litigation must eventually come to an end.

As to the fees and costs of Zuckerman Spaeder, the undersigned allowed Farella, Braun and Martel to submit additional supporting documentation by the close of the hearing on the motion to amend. Thereafter, Farella, Braun and Martel timely submitted copies of the invoices which it had received from Zuckerman Spaeder and paid during the pendency of the litigation. Then, on April 28, 1997, after considering the invoices, the undersigned held a telephone conference with counsel for the parties and explained that she was satisfied that the costs incurred at Zuckerman Spaeder were adequately supported and reasonable, but that she would not reimburse the Zuckerman Spaeder fees as an item of out-of-pocket costs. As found by the Court, the reasonable reimbursable costs incurred at the Zuckerman Spaeder firm were $57,674.41.[18]

Therefore, based on the foregoing and for the reasons stated on the record at the March 31, 1997 Fairness Hearing, the April 25, 1997 hearing on the motion to amend, and the April 28, 1997 telephone conference, and being otherwise fully advised in the premises, the undersigned finds that the Motion To Alter Or Amend Final Judgment With Respect To Cost Award should be granted in part and denied in part,[19] and that it should be amended to reflect that the total reasonable, reimbursable costs incurred by the Farella, Braun & Martel law firm as class counsel are $2,325,800.77.[20]

Accordingly, it is hereby

---

[18] The Court disallowed further amounts requested for the use of Zuckerman Spaeder's office space.

[19] The motion is denied in part because the Court has disallowed reimbursement of costs claimed by Farella, Braun and Martel in the amount of $480,835.23 for the reasons stated on the record during the hearings referred to in this Order.

[20] The total consists of $126,519.07 awarded in the April 2, 1997 Final Judgment Order, $2,141,607.29 awarded at the April 21, 1997 hearing on the motion to amend, and $57,674.41 awarded during the April 28, 1997 telephone conference.

ORDERED AND ADJUDGED that the Motion of Plaintiffs' Class counsel to Alter or Amend the Final Judgment entered by this Court on April 2, 1997 is GRANTED IN PART as set forth above. It is further

ORDERED AND ADJUDGED that the total reasonable, reimbursable costs incurred by Farella, Braun & Martel, as lead class counsel, is $2,325,800.77. It is further

ORDERED AND ADJUDGED that the Final Judgment entered by this Court on April 2, 1997 shall be amended consistent with the Court's findings herein by separate Order issued concurrently herewith.

DONE AND ORDERED in Chambers at Miami, Florida, this [8] day of May, 1997.

APPENDIX F

Order denying Petition for Panel Rehearing and Petition for Rehearing en banc, filed December 23, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-5074

WILLIAM WATERS,
LINDA BARTHOLOMEW,
individually, and on behalf of
all those similarly situated,

Plaintiffs-Appellees,

versus

INTERNATIONAL PRECIOUS METALS
CORPORATION, MULTIVEST, INCORPORATED, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the
Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__,
_____F.2d___).

Before: TJOFLAT and BIRCH, Circuit Judges, and BRIGHT*,
Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc

(Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

*Honorable Myron H. Bright, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

APPENDIX G

Stipulation of Settlement,
dated January 17, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

WILLIAM WATERS AND LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated, Plaintiffs, -against- INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, Individually and as Trustee of the Jason Grosfeld Trust, MULTIVEST REAL ESTATE, INC., S. S. MELBOURNE, INC., and THE CYPRESS GROUP, INC., Defendant.	Case No. 90-6863-CIV-UNGARO-BENAGES STIPULATION OF SETTLEMENT

STIPULATION OF SETTLEMENT
PREAMBLE

This Stipulation of Settlement (the "Stipulation"), dated as of January 17, 1997, and as amended and restated pursuant to the amendment to the Stipulation of Settlement pursuant to § 10.6 of this Stipulation (attached as Exhibit C), and the Second Amendment of Stipulation of Settlement (attached hereto as Exhibit D), is made and entered into by and among the following parties to the above-entitled Litigation: (i) The Representative Plaintiffs (on behalf of themselves and each of the Settlement Class Members), by and through their counsel of record in the Litigation; and (ii) Defendants International Precious Metals Corporation, MultiVest, Inc., and James

Grosfeld, Individually (the "Individual Defendant") and as Trustee of the Jason Grosfeld Trust, MultiVest Real Estate, Inc., S. S. Melbourne, Inc. and The Cypress Group, Inc. The Stipulation is intended by the Settling Parties to fully, finally and forever resolve, discharge and settle the Released Claims (as defined herein), and to dismiss with prejudice and without costs this Litigation and the Conveyance Litigation, upon and subject to the terms and conditions hereof.

THE LITIGATION

1. The action of *William Waters and Linda Bartholomew v. International Precious Metals Corp., et al.*, No. 90-6863 is currently in trial in the United States District Court of the Southern District of Florida before The Honorable Ursula Ungaro-Benages (the "Court"). In April 1990, Plaintiffs filed a complaint in the United States District Court for the Northern District of California. On October 17, 1990, this case was transferred to the Southern District of Florida.

2. Plaintiffs allege that Defendants violated Section 4c(b) and 22 of the Commodity Exchange Act ("CEA"), as amended, 7 U.S.C. §§ 6c(b) and 25, and rules and regulations promulgated thereunder, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C §§ 1961 *et. seq.*, and provisions of the Florida Securities and Investor Protection Act, Fla. Stat. §§ 517.211, 517.301 and 517.312. Plaintiffs further allege common law claims for fraud, aiding and abetting breach of fiduciary duty, inducing breach of contract, negligent misrepresentation, and constructive fraud. One count of the complaint alleges violations of the Uniform Fraudulent Transfer Act, Fla. Stat. §§ 726.101, *et. seq.*

3. James Grosfeld is sued individually and as trustee of the Jason Grosfeld Trust, a trust set up for the benefit of Grosfeld's minor son and of which Grosfeld serves as trustee. MultiVest, Inc. was, at all relevant times, owned 100% by Grosfeld and his son's trust. MultiVest Options, Inc. was a wholly owned subsidiary of MultiVest, Inc. Also named as

Defendants are MultiVest Real Estate, Inc., S.S. Melbourne, Inc., and the Cypress Group, Inc., who are named solely with respect to certain claims alleging fraudulent transfers.

4. The plaintiff class was certified by order of the Court pursuant to Rule 23 of the Federal Rules of Civil Procedure on June 22, 1993.

5. The Defendants have denied and continue to deny each of the claims and contentions alleged by the Representative Plaintiffs in the Litigation. The Defendants have denied and continue to deny all charges of wrongdoing or liability against them arising out of any of the conduct, statements, acts or omissions alleged, or that could have been alleged, in the Litigation. The Defendants also have denied and continue to deny, *inter alia*, the allegations that the Representative Plaintiffs or the Settlement Class Members have suffered damage, or that the Representative Plaintiffs or the Settlement Class Members were harmed by the misrepresentations, omissions and other wrongful conduct alleged in the Complaint. Defendants believe that the evidence introduced to date at the trial does not support Plaintiffs' claims. Defendants also believe that they have other defenses sufficient to defeat plaintiffs' claims and that the District Court has entered erroneous rulings which render any verdict reversible on appeal.

6. Nonetheless, the Defendants have concluded that the further conduct of the Litigation and current trial would be protracted and expensive, and that it is desirable that the Litigation be fully and finally settled in the manner and upon the terms and conditions set forth in this Stipulation in order to limit further expense, inconvenience and distraction, and to dispose of burdensome and protracted litigation.

7. Plaintiffs' Class Counsel of Record believe that the claims asserted in the Litigation have merit and that the evidence developed and presented in trial to date supports the claims asserted. However, Plaintiffs' Class Counsel of Record

recognize the expense and length of continued proceedings necessary to prosecute the Litigation against the Defendants through trial and potential appeals. Plaintiffs' Class Counsel of Record also have taken into account the uncertainty regarding the eventual outcome and the risk of any litigation, especially in complex actions such as this Litigation, as well as the difficulties and delays inherent in such litigation. Plaintiffs' Class Counsel of Record also are mindful of the inherent problems of proof under and possible defenses to the federal commodities law violations and other claims asserted in the Complaint. Plaintiffs, Class Counsel of Record believe that the settlement set forth in the Stipulation confers substantial benefits upon the Settlement Class and each of the Settlement Class Members. Based on their evaluation, Plaintiffs' Class Counsel of Record have determined that the Settlement Agreement set forth in the Stipulation is in the best interests of the Representative Plaintiffs and the Settlement Class and each of the Settlement Class Members.

TERMS OF STIPULATION AND AGREEMENT OF SETTLEMENT

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and among the Representative Plaintiffs (for themselves and the Settlement Class Members) and Defendants (as defined in § 1.5) by and through their respective counsel or attorneys of record that, subject to the approval of the Court, this Litigation and the Released Claims and the Conveyance Litigation, and all claims which were or could have been seen asserted therein shall be finally and fully compromised, settled and released, and this Litigation and the Conveyance Litigation, shall be dismissed with prejudice, as to all Settling Parties, upon and subject to the terms and conditions of the Stipulation, as follows:

1. *Definitions*

As used in the Stipulation the following terms have the means specified below:

1.1 "Authorized Claimant" means any Settlement Class Member whose claim for recovery has been allowed pursuant to the terms of the Stipulation.

1.2 "Authorized Claim" means the claim of an Authorized Claimant which has been allowed pursuant to the terms of the Stipulation.

1.3 "Claimant" means any Settlement Class Member who files a Proof of Claim and Release.

1.4 "Conveyance Litigation" means all actions, claims and proceedings which were asserted in, could have been asserted in or relate to *William Waters v. James & Nancy Grosfeld*, Case No. 95-73108 filed in the United States District Court for the Eastern District of Michigan.

1.5 "Defendants" means James Grosfeld, individually and as Trustee of the Jason Grosfeld Trust; International Precious Metals Corp., MultiVest, Inc., MultiVest Real Estate Inc., S.S. Melbourne Inc. and The Cypress Group Inc.

1.6 "Distribution Date" means the tenth business day following the date on which the Court enters its order approving or modifying the Settlement Administrator's Initial Distribution Report as provided in Section 6.3(b).

1.7 "Document Letter" means that certain letter of understanding executed by Plaintiffs' Settlement Counsel and counsel for Defendants dated January [17], 1997 which describes in its text and exhibits the terms of certain documents related to this Stipulation, including the Master Promissory Note, the Promissory Notes, the Note Administration and Pledge Agreement and the Representations and Warranties.

1.8 "Effective Date" means the first date by which all of the events and conditions specified in § 8.2 of the Stipulation have been met and have occurred.

1.9 "Execution Date" means the date on which the last of the signatures required to form the agreement embodied in this

Stipulation are affixed as provided in § 10.10 of this Stipulation.

1.10 "Exhibits" means the exhibits to this Stipulation which are incorporated by reference; namely, "Exhibit A: Order with Respect to Notice, Settlement Hearing and Administration of Class Action Settlement" (the "Hearing Order"); Exhibit A-1: Notice of Proposed Settlement of Class Action, Settlement Hearing and Right to Appear; Exhibit A-2: Summary Notice; Exhibit A-3: Proof of Claim and Release; and Exhibit B: Final Order and Judgment approving Settlement ("Final Order"); Exhibit C: Settlement Class listed on Plaintiffs' Update of Defendants' Submission "A" incompliance with the Court's August 12, 1996 Order; Exhibit D: Settlement Class Roster as Plaintiffs' Update of Defendants' Submission B in Compliance with the Court's August 12, 1996 Order.

1.11 "Final" means: (i) the date of final affirmance on an appeal of the Judgment, the expiration of the time for a petition for a writ of certiorari to review the Judgment and, if certiorari be granted, the date of final affirmance of the Judgment following review pursuant to that grant; or (ii) the date of final dismissal of any appeal from the Judgment or the final dismissal of any proceeding on certiorari to review the Judgment; or (iii) if no appeal is filed, the expiration date of the time for the filing or noticing of any appeal from the Court's Final Order and Judgment approving the Stipulation substantially in the form of Exhibit "B" hereto, all as determined under the Federal Rules of Civil Procedure. Any proceeding, order, appeal or petition for a writ of certiorari pertaining solely to an application for attorneys' fees, costs or expenses, shall not in any way delay or preclude the Judgment from becoming final.

1.12 "Hearing Notice" means the Notice to be mailed to Settlement Class Members as provided in § 4.1(b), substantially in the form appended hereto as Exhibit A-1.

1.13 "Final Order and Judgment" means the judgment to be rendered by the Court, substantially in the form attached hereto as Exhibit B.

1.14 "Irrevocable Letter of Credit" means a letter of credit as described in § 2.3(a) hereof.

1.15 "Litigation" means all actions, claims and proceedings which were asserted in, could have been asserted in or relate to *Waters and Bartholomew v. Int'l Precious Metals Corp., et al.*, Case No. 90-6863 which is in trial in the United States District Court for the Southern District of Florida before The Hon. Ursula Ungaro-Benages as of the date of this Stipulation.

1.16 "Marketable Securities" means any readily tradable United States Government Securities with a maturity of less than one year, and any readily tradable commercial paper having maturities of less than one year issued by a corporation formed under the laws of any of the states of the United States rated P-1 or A-1 or better or any readily tradable common stock of Pulte Corporation or Centex Corporation.

1.17 "Monthly Statements" means the account statements which were generated each month by MultiVest Options, Inc. or IPMC Options, Ltd. and mailed to their customers.

1.18 "Net Settlement Fund" means the remainder of the Settlement Fund after deduction of all fees, costs, expenses, taxes and other charges in accordance with this Stipulation.

1.19 "Person" means an individual, corporation, partnership, limited partnership, association, joint stock company, estate, legal representative, trust, unincorporated association, government or any political subdivision or agency thereof, and any business or legal entity and their spouses, heirs, predecessors, successors, representatives, or assigns.

1.20 "Plaintiffs' Settlement Counsel" means Farella Braun & Martel LLP, Neil A. Goteiner, Gary S. Anderson, C. Brandon Wisoff, Karen P. Kimmey, and/or John L. Cooper, 235 Montgomery Street, 30th Floor, San Francisco, CA 95104 and/or Eric G. Lipoff, and/or Raring & Lipoff, 3070 Bristol, Suite 680, Costa Mesa, CA 92626.

1.21 "Plaintiffs' Class Counsel of Record" means all counsel representing the Representative Plaintiffs or Settlement Class Members who are signatory to this Stipulation.

1.22 "Plan of Allocation" means a plan of allocation of the Settlement Fund whereby the Settlement Fund shall be distributed to Authorized Claimants after payment of all fees, costs and expenses, including, without limitation, expenses of notice and administration of the Settlement and such attorneys' fees, costs, expenses and interest as may be awarded by the Court, as described in § 6.3.

1.23 "Promissory Notes" shall mean the promissory notes described in § 2.2 which are to be issued to Authorized Claimants.

1.24 "Proof of Claim and Release" means the proof of claims and release which Settlement Class Members are required to complete pursuant to this Stipulation substantially in the form annexed hereto as Exhibit A-3.

1.25 "Receiver" means James McTivia as Receiver of MultiVest Options, Inc. in the Receivership Litigation and his predecessors and successors and any other person serving as Receiver of MultiVest Options, Inc.

1.26 "Related Parties" means each of a Person's past or present directors, officers, employees, partners, principals, agents, insurers, co-insurers, reinsurers, controlling shareholders, attorneys, accountants, personal or legal representatives, predecessors, successors, parents, subsidiaries, divisions, joint ventures, assigns, spouses, heirs, related or affiliated entities, any entity in which any Defendant has a

direct or indirect controlling interest, any members of their immediate families, or any trust of which any Defendant is the settlor or which is for the benefit of any Defendant and/or member(s) of his family.

1.27 "Released Claims" means any and all claims or causes of action, including "Unknown Claims" as defined in § 1.38 hereof, demands, rights, liabilities and causes of action of every nature and description whatsoever, known or unknown, asserted or that might have been asserted, including, without limitation, claims for negligence, gross negligence, breach of duty of care and/or breach of duty of loyalty, fraud, breach of fiduciary duty, or violations of any state or federal statutes, rules or regulations by the Representative Plaintiffs, the Settlement Class Members, or any of them, in the Litigation or the Conveyance Litigation based upon or related to any transaction with MultiVest Options, Inc. by any Settlement Class Member during the Settlement Class Period, any conveyance of property by Defendant James Grosfeld, or the facts, transactions, events, occurrences, acts, disclosures, statements, omissions or failures to act which were or could have been alleged in the Litigation or the Conveyance Litigation.

1.28 "Released Persons" means each and all of the Defendants and their Related Parties, including, without limitation, MultiVest Options, Inc. (as used herein "MultiVest Options, Inc." shall include IPMC Options, Ltd.).

1.29 "Representative Plaintiff(s)" means William Waters and/or Linda Bartholomew acting on behalf of themselves or on behalf of the Settlement Class and/or the Settlement Class Members.

1.30 "Settlement" means the settlement embodied in this Stipulation of Settlement.

1.31 "Settlement Administrator" means the Garden City Group or any other replacement Person selected by

agreement of Plaintiffs' Settlement Counsel and Defendant's counsel to administer the Settlement Fund and process Claimants' Proofs of Claim and Release, or in the event they fail to agree within ten (10) business days following any notice of the then Settlement Administrator of its intention to resign or any vacancy in this position, then as appointed by the Court upon motion by Plaintiffs or Defendants or any of them.

1.32 "Settlement Agreement" means the agreement embodied in this Stipulation of Settlement.

1.33 "Settlement Class" means all those persons listed on Plaintiffs' Update of Defendants' Submission "A" in compliance with the Court's August 12, 1996 Order and Plaintiffs' Update of Defendants' Submissions "B" in compliance with the Court's August 12, 1996 Order (hereafter "Submissions A and B") attached hereto as Exhibits C and D.

1.34 "Settlement Class Member" or "Member of the Settlement Class" means any Person who falls within the definition of the Settlement Class as set forth in § 1.33 of the Stipulation, including the Representative Plaintiffs.

1.35 "Settlement Class Period" means the period from June 1, 1985, through and including October 31, 1989.

1.36 "Settlement Fund" means the sum of the cash and the aggregate initial principal amount of the Master Promissory Note to be delivered to the Settlement Administrator pursuant to § 2.2 of this Stipulation.

1.37 "Settlement Hearing" means the hearing held by the Court to consider final approval of the Stipulation pursuant to Fed. R. Civ. P. Rule 23.

1.38 "Settling Party(ies)" means, individually or collectively, each or all of the Defendants and the Settlement Class Members.

1.39 "Stipulation" means this Stipulation of Settlement and all Exhibits attached hereto (which are incorporated by

reference) and the Document Letter executed by Plaintiffs Settlement Counsel and counsel for Defendants, and all Exhibits thereto.

1.40 "Summary Notice" means the printed summary of the Hearing Notice to be published substantially in the form of Exhibit A-2.

1.41 "Unknown Claims" means any Released Claims which any Settlement Class Member does not know or suspect to exist in his, her or its favor at the time of the release of the Released Persons which, if known by him, her or it, might have affected his, her or its settlement with and release of the Released Persons, or might have affected his, her or its decision not to object to this settlement.

1.42 "United States Government Securities" means any instrument backed by the full faith and credit of the United States Government or fully insured by the United States Government or an agency thereof.

2. *The Settlement*

2.1 The Settling Parties are executing this Stipulation to settle, compromise and release all claims which have been asserted or could have been asserted in the Litigation or the Conveyance Litigation and to provide for the dismissal with prejudice and without costs of each of these Litigations. To that end, each of these litigations shall be dismissed with prejudice and without costs and all claims which were or could have been asserted in those litigations shall be released as herein provided. Subject to the provisions of Section 2.5, Plaintiffs' Class Counsel of Record shall dismiss the Conveyance Litigation without prejudice and without costs not later than two (2) business days after the Final Order and Judgment in this Litigation becomes Final as defined in §1.11.

2.2 Defendants shall cause James Grosfeld to deposit the Settlement Fund in the amount of $40,000,000 by delivery actually made to the Settlement Administrator,

contemporaneously with the entry of an order by the United States District Court for the Southern District of Florida preliminarily approving this Stipulation (the "Preliminary Approval Order"), 25% of which ($10,000,000) shall be in immediately available funds transferred by Federal Reserve Bank wire transfer to a bank account specified by the Settlement Administrator and the balance of which (75%) shall be represented by a Master Promissory Note described below in this section, delivered to the Settlement Administrator. If the Settlement Fund is not delivered simultaneously with the entry of the Preliminary Approval Order, at the election of Plaintiffs', Settlement Counsel, this failure of delivery will be treated in the same manner as the Court's failure to enter is order preliminarily approving this Stipulation as provided in § 8.3 or as in §8.4.

The Master Promissory Note will be substantially in the form attached to the Document Letter, or as otherwise approved by Plaintiffs' Settlement Counsel and Defendants' counsel and otherwise on the following terms (which in the event of any conflict shall be as provided in the instrument attached to the Document Letter):

Until paid in full, the Master Promissory Note will bear interest per annum at a rate equal to the rate of interest payable per annum (including calculations of compounding and generally referred to as the yield) on $100,000 denomination FDIC insured certificates of deposit having a maturity of five years offered by NBD Bank on the date the Stipulation is executed, or the first business day preceding that date if that date is not a business day. Interest will be payable annually on December 15, commencing December 15, 1997, and on the maturity of the note. Interest will commence to accrue on the Distribution Date defined in § 6.3(b).

The Master Promissory Note will mature on the tenth anniversary of the Distribution Date, and earlier on events of default. However, this note or any portion thereof shall be

payable upon demand on the first business day after the fifth anniversary of the Distribution Date (the "Five Year Maturity Date"), provided that notice of intention to demand payment at the Five Year Maturity Date must be given not more than one year, nor later than fifteen days, prior to the Five Year Maturity Date, in which event the Maturity Date with respect to the sums demanded will become the Five Year Maturity Date; or if no such notice is given, then on the Maturity Date. Notice of this right to demand early payment shall be enclosed with the interest payment made on the December 15 preceding the Five Year Maturity Date and otherwise as reasonably determined by the Settlement Administrator.

The obligations under the Master Promissory Note shall be secured by the pledge of Marketable Securities (as provided in § 2.3(b)), and within one hundred twenty (120) days after the presentation of this Stipulation to the Court for preliminary approval shall be secured by the Irrevocable Letter of Credit described in this section and § 2.3. The Irrevocable Letter of Credit shall also secure the obligations under the Promissory Notes described below, if and when they are issued. The only risk on the Master Promissory Note and the Promissory Notes to which the note holders shall be exposed is the failure of NBD or any other bank issuing the Letter of Credit.

The individual Promissory Notes shall not be restricted to prevent them from being sold or discounted to other persons or financial institutions and shall be transferable to the heirs and assigns of Authorized Claimants.

The Promissory Notes shall be issued by a Bankruptcy Remote Corporation and secured by the Irrevocable Letter of Credit.

The Master Promissory Note, the Promissory Notes, the Note Administration and Pledge Agreement, Bankruptcy Remote Corporation (Defined) and the Irrevocable Letter of Credit shall be substantially in the form attached to the

Document Letter or otherwise as approved in writing by Plaintiffs' Settlement Counsel and counsel for Defendants.

Pursuant to the Plan of Allocation described in § 6.3, each Authorized Claimant is to be distributed one or more Promissory Notes representing each Class Member's Settlement Amount. The Promissory Notes shall be on the same economic terms as the Master Promissory Note.

The Master Promissory Note shall be reduced as provided in § 6.2(e) and by the amounts represented by the substituted individual and separate Promissory Notes issued by a Bankruptcy Remote Corporation in the appropriate amounts payable to each Authorized Claimant and otherwise on the terms provided in this Stipulation. The maker of the Master Promissory Note shall be obligated to cause the Bankruptcy Remote Corporation to execute and deliver the Promissory Notes to the Settlement Administrator within ten (10) days after requested in writing by the Settlement Administrator, and any failure to do so will constitute an event of default with respect to the Master Promissory Note which will immediately accelerate the maturity of the obligations under the Master Promissory Note and require the liquidation of the collateral for the Master Promissory Note including any Marketable Securities or draw on the Irrevocable Letter of Credit.

Prior to the time of distribution to the Authorized Claimants of the Promissory Notes, the Settlement Administrator shall appoint a Paying Agent who shall be The First National Bank of Chicago or some other Person who is approved in writing by Plaintiffs' Settlement Counsel and counsel for Defendants, or if they cannot agree then as approved by the Court, who is willing to serve as the Paying Agent pursuant to the Note Administration and Pledge Agreement. The Note Administration and Pledge Agreement shall be effective between the parties to this Stipulation without the need for the approved Paying Agent consenting to serve under the agreement, but the Promissory Notes will not be

distributed until the approved Paying Agent has agreed to serve under the terms of the Note Administration and Pledge Agreement.

2.3(a) Defendants shall cause James Grosfeld to provide not later than one hundred twenty (120) days after the presentation of this Stipulation to the Court for preliminary approval and shall thereafter maintain in effect the Irrevocable Letter of Credit. All sums due with respect to the Master Promissory Note and the Promissory Notes will be secured by the Irrevocable Letter of Credit. The Irrevocable Letter of Credit will be subject to approval in writing as to amount, form, substance and issuer by the Settlement Administrator and Plaintiffs' Settlement Counsel, who shall not unreasonably withhold their approval. The Irrevocable Letter of Credit will be an irrevocable letter of credit not expiring before one year from the date of its original issuance and will be fully drawable if not renewed at least sixty (60) days before its expiration, and will continue in full force and effect until all sums secured thereby have been paid in full. The Irrevocable Letter of Credit will be issued by NBD Bank, Detroit, Michigan, or a United States national bank of comparable creditworthiness (determined as of the date of execution of the Stipulation), in an amount not less than the sum of (i) the original principal amount of the Master Promissory Note, plus (ii) an amount equal to the interest that would accrue on the Master Promissory Note and Promissory Notes from the Distribution Date through December 15, 1998, but in no event less than one year's interest at the interest Rate (provided that after December 15, 1998, the amount with respect to interest shall be reduced to one year's interest on these notes). The Irrevocable Letter of Credit will be drawable up to the amount of all outstanding obligations under the Master Promissory Note and the Promissory Notes (but without duplication), including unpaid principal, interest accrued through and including the date of payment and the other sums due with respect to these notes, upon demand by the Settlement Administrator and/or the

Paying Agent notwithstanding any action by the payor, or any guarantor, endorser or other party contesting the rights of the Paying Agent to draw upon the Irrevocable Letter of Credit.

2.3(b) Concurrently with delivery of the Settlement Fund pursuant to § 2.2, Defendants shall deliver to the Settlement Administrator Marketable Securities securing the performance of the Defendants' obligations hereunder and under the Master Promissory Note, together with the Note Administration and Pledge Agreement in the form attached to the Document Letter or as otherwise approved in writing by Plaintiffs' Settlement Counsel and counsel for Defendants. The Note Administration and Pledge Agreement will be effective at the time of the delivery of the Marketable Securities even if no approved Paying Agent has then agreed to serve under the agreement. In connection with and concurrently with the delivery of the Marketable Securities, Defendants shall deliver evidence that such actions have been taken and such documents executed, delivered or filed as is necessary or reasonably required in the opinion of Plaintiffs' Settlement Counsel to create, perfect and maintain a first priority perfected security interest in the Marketable Securities in favor of the Settlement Administrator for the benefit of the holders of the Master Promissory Note and Promissory Notes. The Note Administration and Pledge Agreement shall provide that the Marketable Securities shall be held by the Settlement Administrator as security for the obligations of the Defendants, including James Grosfeld, until the Irrevocable Letter of Credit is timely provided, in which event the pledge of the Marketable Securities will terminate and the Marketable Securities will be returned to the Defendants.

The Marketable Securities shall, at all times, have a fair market value equal to at least one hundred and five (105%) percent of the sum of the face amount of the Master Promissory Note plus one year's interest on these notes (the "Required Amount"). Any Marketable Security in the form of cash shall be deemed to have a fair market value equal to the amount of

the cash. Any Marketable Securities in the form of United States Government Securities or commercial paper will be deemed to have a fair market value equal to the then current price at which the Government Security or commercial paper is trading in the public markets. Any Marketable Security in the form of readily tradable common stock of Pulte Corporation or Centex Corporation shall be deemed to have a fair market value at which that common stock is then trading in the public markets, but each $142.86 of this fair market value shall be counted as $100 for the purpose of determining the Required Amount, provided that if the Marketable Securities consist exclusively of the Pulte Corporation stock, the fair market value of this stock shall not be less than $47,700,000. If at any time the fair market value, as determined above, of the Marketable Securities becomes less than the Required Amount, Defendants shall promptly and in all events within five (5) business days, deposit sufficient additional Marketable Securities with the Settlement Administrator pursuant to the Note Administration and Pledge Agreement such that the aggregate value of all Marketable Securities deposited with the Settlement Administrator is not less than the Required Amount.

In the event the irrevocable Letter of Credit is not in place 30 days after the entry of the Preliminary Approval Order, or in the event of Defendants' failure to maintain the value of the Marketable Securities which is not cured within the time periods herein provided, the Master Promissory Note shall become immediately due and payable and the Settlement Administrator or other collateral agent under the Note Administration and Pledge Agreement shall forthwith sell the Marketable Securities and apply the proceeds to the payment of the Master Promissory Note and institute any proceedings necessary to collect full payment of the Master Promissory Note.

2.4 Defendant James Grosfeld warrants that at the time of the payment described in § 2.2, he was not insolvent nor did the payment required to be made by or on behalf of him render

such Defendant insolvent, nor did the pendency of this lawsuit render him insolvent within the meaning of and/or for the purposes of applicable bankruptcy laws and agrees to make and deliver the Representations and Warranties in the forth attached to the Document Letter to Plaintiffs' Settlement Counsel at the same time the Settlement Fund is delivered pursuant to this Stipulation.

2.5 If a case is commenced in respect of Defendant James Grosfeld or the corporation issuing the Promissory Notes, under applicable bankruptcy laws, or a trustee, receiver or conservator is appointed under any similar law, and in the event of the entry of a final order of a court of competent jurisdiction determining the transfer of the Settlement Fund, or any portion thereof, by or on behalf of such Defendant to be a preference, voidable transfer, fraudulent transfer or similar transaction, full payment of the Letter of Credit shall be made to the Settlement Administrator on or before the Distribution Date or to the Settlement Administrator and the holders of the Promissory Notes if Promissory Notes are outstanding. If any event of bankruptcy results in a deficiency in the Settlement Fund such that any Promissory Notes or fee, cost or expense of Settlement cannot be paid, all Releases of the Conveyance Litigation shall be recinded to the extent necessary to remedy any such deficiency. The Conveyance Litigation shall be dismissed without prejudice until one hundred (100) days after the posting of the Irrevocable Letter of Credit as provided herein, and at that time the dismissal shall be with prejudice; provided that all statutes of limitation, claims of laches and similar time bars will be tolled during this period between the dismissal without prejudice and the dismissal with prejudice.

2.6 The Settlement Administrator shall invest all cash which it holds to the extent not reasonably required for immediate distribution, including the cash portion of the Settlement Fund deposited pursuant to § 2.2 above in United States Government Securities and shall reinvest the proceeds of

these instruments as they mature in similar instruments at their then current market rates.

2.7 The Settlement Administrator shall not disburse the Settlement Fund except as provided in this Stipulation, or with the written agreement of counsel for Defendants and Plaintiffs' Settlement Counsel.

2.8 The Settlement Administrator is authorized to execute such transactions on behalf of the Settlement Class Members as are consistent with the terms of the Stipulation.

2.9 All funds held by the Settlement Administrator shall be deemed and considered to be in *custodia legis* of the Court, and shall remain subject to the jurisdiction of the Court, until such funds shall be distributed pursuant to the Stipulation; provided, however, if this Stipulation and Settlement Agreement are terminated as provided herein, all such funds, less amounts retained for the payment of appropriate expenses incurred but not paid, shall be returned within five (5) business days of any such termination.

2.10(a) This Section relates to the taxation of income earned on the Settlement Fund. The Defendants and the Settlement Administrator agree to treat the Settlement Fund as being at all times a "qualified settlement fund" within the meaning of Treas. Reg. Section 1.468B-1. In addition, the Settlement Administrator and, as required, the Defendants shall jointly and timely make such elections as necessary or advisable to carry out the provisions of this § 2.10, including the "relation-back election" (as defined in Treas. Reg. Section 1.468B-1) back to the earliest permitted date. Such elections shall be made in compliance with the procedures and requirements contained in such regulations. It shall be the responsibility of the Settlement Administrator to timely and properly prepare, and deliver the necessary documentation for signature by all necessary parties, and thereafter to cause the appropriate filing to occur.

(b) For the purpose of Section 468B of the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder, the "administrator" shall be the Settlement Administrator. The Settlement Administrator shall timely and properly file all informational and other tax returns necessary or advisable with respect to the Settlement Fund (including without limitation the returns described in Treas. Reg. Section 1.466B-2(K). Such returns (as well as the election described in § 2.10(a) shall be consistent with this § 2.10 and in all events shall reflect that all taxes (including any interest or penalties) on the income earned by the Settlement Fund shall be paid out of the Settlement Fund as provided in § 2.10(c) hereof.

(c) All (a) taxes (including any interest or penalties) arising with respect to the income earned by the Settlement Fund, including any taxes or tax detriments that may be imposed upon the Defendants with respect to any income earned by the Settlement Fund for any period during which the Settlement Fund does not qualify as a "qualified settlement fund" for Federal or state income tax purposes ("Taxes") and (b) expenses and costs incurred in connection with the operation and implementation of this § 2.10 (including, without limitation, expenses of tax attorneys and/or accountants and mailing and distribution costs and expenses relating to filing (or failing to file) the returns described in this § 2.10) ("Tax Expenses"), shall be paid out of the Settlement Fund. The Settlement Administrator out of the Settlement Fund shall indemnify and hold Defendants harmless for Taxes and Tax Expenses (including, without limitation, taxes payable by reason of any such indemnification). Further, Taxes and Tax Expenses shall be treated as and considered to be, a cost of administration of the Settlement and shall be timely paid by the Settlement Administrator out of the Settlement Fund without prior order from the Court and the Settlement Administrator shall be obligated (notwithstanding anything herein to the contrary) to withhold from distribution to Settlement Class

Members any funds necessary to pay such amounts including the establishment of adequate reserves for any Taxes and Tax Expenses (as well as any amounts that may be required to be withheld under Treas. Reg. Section 1.468B-2(l)(2)). The parties hereto agree to cooperate with the Settlement Administrator, each other, and their tax attorneys and accountants to the extent reasonably necessary to carry out the provisions of this § 2.10.

2.11 The Plaintiffs' Settlement Counsel and Defendants shall use their best efforts and good faith to secure approval of the Settlement Agreement set forth in this Stipulation and shall not attack this Stipulation in the settlement approval process.

3. *Class Notice and Administration Expenses*

3.1 The Settlement Administrator shall pay from the Settlement Fund the costs and expenses reasonably incurred in connection with providing notice to the Settlement Class, attempting to locate Settlement Class Members, soliciting the filing of Proof of Claim and Release forms, assisting with the filing of claims, administering and distributing the Settlement Fund to Authorized Claimants, processing Proofs of Claim and Release forms and paying escrow fees and costs, if any, out of the Settlement Fund. The Settlement Administrator is authorized to and shall use reasonable due diligence, utilizing customary procedures to identify, locate and obtain mailing addresses for the Settlement Class Members as defined in § 1.34 and provide them with notice of the settlement and claim procedures. The Settlement Administrator may contract with outside service providers to obtain these services.

3.2 If the Settlement is terminated pursuant to the terms of this Stipulation or is not approved as Final, any unused portion of the Settlement Fund, reduced by any reserve necessary for expenses incurred but not paid, shall be returned to Defendants within five business days of such termination. Except as provided in this Section and Section 3.3, in the event the

Settlement is terminated, no party to this Stipulation shall be responsible for any expenses previously incurred as described herein, including expenses incurred in connection with the notification of and the costs of settlement administration; nor shall any party be obligated to reimburse any person contributing funds for such expenses.

3.3 The Settlement Administrator shall be permitted to withdraw funds from the Settlement Fund to pay any necessary costs described above without prior approval of the Court or any of the other signatories to this Stipulation.

4. *Hearing Order and Settlement Hearing*

4.1 Subject to the provisions of § 8.1, the Settling Parties shall submit this Stipulation as soon as possible after the execution, together with its Exhibits, to the Court and shall jointly apply for entry of the Hearing Order, substantially in the form of Exhibit "A" hereto:

(a) Directing that a Settlement Hearing be held, as soon as practicable, to determine whether the Stipulation should be approved as fair, reasonable and adequate under Rule 23 and whether judgment should be entered dismissing the Complaint against the Defendants on the merits and with prejudice and without costs; and in the event that the Court approves this Stipulation, to pass upon the application of Plaintiffs' Settlement Counsel and Plaintiffs Class Counsel of Record for allowance of fees and expenses, and to pass on such other matters as the Court may deem appropriate;

(b) Providing that notice of this Stipulation and of the Settlement Hearing be given in the name of the Clerk of the Court by or at the direction of the Court to all persons who are Members of the Settlement Class by ordering:

(i) That notice to Settlement Class Members shall be given by the Settlement Administrator by mailing a copy of the Hearing Notice, substantially in the form annexed hereto as Exhibit A-1, which shall include a description of

the general terms of the Stipulation, the proposed Plan of Allocation and Plaintiffs' Settlement Counsel's application for a Fee and Expense Award, and the Proof of Claim and Release, substantially in the form annexed hereto as Exhibit A-3, to all Settlement Class Members.

(ii) That the Settlement Administrator shall publish a Summary Notice substantially in the form annexed hereto as Exhibit A-2 once in the national editions of *The New York Times, The Wall Street Journal* and *USA Today* at approximately the same time as the initial mailing of the Notice.

(c) Requiring the filing by the Settlement Administrator or its designee, prior to or at the Settlement Hearing, of proof of mailing of the Hearing Notice and proof of publication of the Summary Notice;

(d) Determining that the notices described above constitute the best notice practicable under the circumstances and constitute due and sufficient notice of the Settlement Hearing and Settlement Agreement to all persons affected by and/or entitled to participate in the Settlement and is in full compliance with the notice requirements of Rule 23 of the Federal Rules of Civil Procedure;

(e) Designating the Settlement Administrator as the tax administrator of the Settlement and authorizing the Settlement Administrator to act on behalf of the Settlement Fund in filing any tax returns deemed appropriate; allowing the Settlement Administrator to pay from the Settlement Fund, without further order of the Court, any taxes, interests, or penalties it deems due or owing to federal, state, or municipal tax authorities; and allowing the Settlement Administrator to sue such authorities for refunds or take any other actions against such authorities to settle the tax issues of the Settlement Fund, without further order of the Court; and

(f) Providing for other matters set forth in Exhibit A.

4.2 The trial of this matter which is being currently conducted before The Hon. Ursula Ungaro-Benages of the United States District Court for the Southern District of Florida shall be suspended pending the Court's consideration of this Stipulation as provided in § 10.2 of this Stipulation and until the Court enters its order granting or denying preliminary approval of this Stipulation, the Settlement Agreement and related procedures and deposit of the Settlement Fund. Except as provided in § 10.2, the Settling Parties shall make no arguments or disclosures regarding this Stipulation or the related negotiations which will or are designed to delay or alter in any way that trial. Upon preliminary approval of this Stipulation and deposit of the Settlement Fund and compliance with the security provisions set forth in § 2.3(b), trial of this Litigation shall be terminated and the jury discharged. The Litigation may thereafter be set for retrial in the event the Settlement is not consummated pursuant to such orders as the Court may enter.

5. *Releases*

5.1 Upon the Effective Date, as defined in § 1.8, each of the Settlement Class Members shall be deemed to have, and by operation of the Final Order and Judgment shall have, fully, finally, and forever released, relinquished and discharged all Released Claims against the Released Persons, whether or not such Settlement Class Member executes and delivers the Proof of Claim and Release.

5.2 The Proof of Claim and Release to be executed by the Settlement Class Members shall release all Released Claims against the Released Persons and shall be substantially in the form contained in Exhibit A-3 hereto.

5.3 This Stipulation and the consideration therefor are offered and given in return for and are contingent upon the release described herein and Defendants receiving full and final dismissals (under Fed. R. Civ. P. 54(b), or otherwise), of this

Litigation and the Conveyance Litigation with prejudice and without costs.

5.4 Upon the Effective Date, as defined in § 1.8, each of the Released Persons shall be deemed to have, and by operation of the Final Order and Judgment shall have, fully, finally, and forever released, relinquished and discharged each and all of the Settlement Class Members and Plaintiffs' Class Counsel of Record from all claims (including "Unknown Claims"), arising out of, relating to, or in connection with the institution, prosecution, assertion, settlement or resolution of the Litigation or the Released Claims.

5.5 With respect to any and all Released Claims, including Unknown Claims, upon the Effective Date, each of the Settlement Class Members shall be deemed to have, and by operation of the Final Order and Judgment shall have, expressly waived and relinquished, to the fullest extent permitted by law, the provisions, rights, and benefits of § 1542 of the California Civil Code (which provides: "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.") or any similar statute or law.

5.6 The Settlement Class Members may hereafter discover facts in addition to or different from those which he, she or it now knows or believes to be true with respect to the subject matter of the Released Claims, but the Settlement Class Members, upon the Effective Date, shall be deemed to have, and by operation of the Final Order and Judgment shall have, fully, finally, and forever settled and released any and all Released Claims, including Unknown Claims, known or unknown, suspected or unsuspected, contingent or non-contingent, whether or not concealed or hidden, which now exist, or heretofore have existed upon any theory of law or equity now existing or coming into existence in the future, including, but not limited to, conduct which is negligent,

intentional, with or without malice, or a breach of any duty, law or rule, without regard to the subsequent discovery or existence of such different or additional facts.

5.7 Following receipt of preliminary approval by the Court and pending final determination of whether the Stipulation should be approved, no one of the Representative Plaintiffs, Settlement Class Members, or Plaintiffs' Class Counsel for Record, either directly, representatively, or in any other capacity, shall commence or prosecute against any of the Released Persons, any action or proceeding in any Court or tribunal asserting any of the Released Claims.

5.8 In the event that any Settlement Class Member shall thereafter bring any action involving any Released Claim against any party in violation of this Stipulation, such Class Member shall indemnify any Released Person who may be made a defendant in any such litigation against any liability or expense arising from any such litigation, whether by reason of contribution, indemnity, attorneys' fees, defense costs or any other liability, cost, fee or expense.

6. *Administration and Calculation of Claims, and Supervision and Distribution of Settlement Fund*

6.1 The Settlement Administrator shall administer, verify, calculate and authorize the claims submitted by Settlement Class Members and shall oversee distribution of the Net Settlement Fund pursuant to the Plan of Allocation (defined in § 6.3 below) to Authorized Claimants. The Settlement Administrator shall assume exclusive responsibility for all communications with the Settlement Class Members upon preliminary approval of the Settlement by the Court. From that date forward, none of Plaintiffs' Settlement Counsel, Plaintiffs' Class Counsel of Record or counsel for Defendants shall engage in any further communication with the Settlement Class, or Settlement Class Members directly or indirectly, or otherwise initiate any communications with any newspaper or information media relating to this litigation, except that such

counsel may communicate with an individual Settlement Class Member who initiates communication with such counsel, may respond to any objection to the Stipulation by communication with the objecting party, may communicate with the Settlement Class for the purpose of supporting the Stipulation and may engage in any communication required by the Court.

6.2 Until the Effective Date, the Settlement Fund shall be used only to pay those costs provided for in Section 3 (Class Notice and Administration Expenses). On and after the Effective Date the Settlement Fund shall be applied as follows:

(a) To pay fees, expenses and costs for Plaintiffs' Settlement Counsel and Plaintiffs' Class Counsel of Record (the "Fee and Expense Award"), in accordance with the orders of the Court;

(b) To pay all the costs and expenses reasonably and actually incurred in connection with the claims process including providing notice to the Class, processing Proofs of Claim and Release forms, and calculating, administering and distributing payments from the Settlement Fund to the Settlement Class;

(c) To pay the Taxes and Tax Expenses;

(d) To distribute the Settlement Fund after deduction of all fees, costs and expenses to Authorized Claimants in accordance with the Plan of Allocation; and (e) All of the cash portion of the Settlement Fund originally deposited by Defendants will be used to pay the foregoing expenses and/or to make cash distributions to Authorized Claimants. The claims administration and note distribution process shall be completed when the Settlement Administrator has submitted its "Final Claims Determination Report" to the Court on the administration process and final orders have been entered by the Court determining the Net Settlement Amount and the Class Member's Settlement Amount (defined in § 6.3(b)) for

each Authorized Claimant. Upon completion of this process, the Settlement Administrator shall, subject to Court approval, notify the Payor under the Master Promissory Note of the amount of the reduction, if any, in the then outstanding Principal Sum of this note (and the maximum drawable amount under the Irrevocable Letter of Credit), with this reduction to be the amount by which the Net Settlement Fund exceeds the sum of (i) the original principal amount of all of the Promissory Notes, including any supplementary Promissory Notes, distributed to Authorized Claimants, plus (ii) the amounts, if any, as to which the Settlement Administrator has elected pursuant to § 6.3(b) to make supplemental direct cash payments to Authorized Claimants. The Settlement Administrator shall from time to time in its reasonable judgment, subject to Court approval at the request of either Defendants' Settlement Counsel or Plaintiffs' Settlement Counsel, make interim determinations of the amount of this reduction as Promissory Notes are distributed and the amount of the Net Settlement Fund becomes closer to the final amount of the Net Settlement Fund. If the Settlement Administrator determines that he no longer requires any amount of the cash or the Master Promissory Note to complete the payment of fees, expenses and distributions contemplated by this Stipulation as a result of the final claim determination or any interim determination, he shall so advise the Payor of the Master Promissory Note and return any excess cash not less than 10 and not more than 15 days after such determination unless otherwise ordered by the Court.

6.3(a) Pursuant to the Plan of Allocation, the Settlement Administrator shall determine the Net Settlement Fund by subtracting from the Settlement Fund, the Fee and Expense Award, Taxes, Tax Expenses and the expenses for notice and administration as provided in § 6.2 above and any other expenses. The Settlement Administrator shall determine each

Settlement Class Member's Recognized Loss. Recognized Loss is the sum of all payments made by a Settlement Class Member to MultiVest Options, Inc. reduced by all payments received from MultiVest Options, inc. and the amount of cash and value of unexpired options in that Class Member's account as of October 11, 1989, or the last month in which a Class Member had an account at MultiVest Options, Inc., if earlier than October 31, 1989, all as shown on the Class Member's Monthly Statements. The Settlement Administrator shall divide the Net Settlement Fund by $119,931,383.40 to determine the Distribution Ratio for all Settlement Class Members. The Settlement Administrator shall determine the distribution to be made to each Settlement Class Member (the "Class Member's Settlement Amount") by multiplying that Settlement Class Member's Recognized Loss by the Distribution Ratio. No adjustment shall be made to the Class Members' Settlement Amounts by reason of the failure of other Settlement Class Members to comply with the procedures set forth herein.

6.3(b) Upon receipt and review of all Proofs of Claim and Release, the Settlement Administrator shall file an initial report (the "Initial Distribution Report") setting forth for each undisputed Authorized Claim (i) the approved amount of each such Authorized Claimant's Recognized Loss, (ii) the percentage of the Net Settlement Fund to which each such Authorized Claimant is entitled (*i.e.*, the Recognized Loss of the Authorized Claim divided by $119,931,383.40, hereinafter the "Class Member's Settlement Percentage"), and (iii) if it can be determined at the time of filing the report, each such Authorized Claimant's Class Member's Settlement Amount, or (iv) if it cannot be determined precisely, the Settlement Administrator's reasonable estimate of the Net Settlement Fund after making allowances for such reserves as the Settlement Administrator determines to be prudent for all sums to be deducted from the Settlement Fund in determining the Net Settlement Fund, and based on this estimate the estimated Class

Member's Settlement Amount for each such Authorized Claimant (the "Class Member's Estimated Settlement Amount").

The identity of each Authorized Claimant, the Authorized Claimant's Recognized Loss, the Class Member's Settlement Percentage, the Class Member's Estimated Settlement Amount and/or the Class Member's Settlement Amount will be as reported by the Settlement Administrator subject only to such modifications as the Court may order in approving the report of the Settlement Administrator.

As used in this Stipulation, "Distribution Date" means the day which is ten business days after the Court enters its order approving or modifying that portion of the Initial Distribution Report which provides for each such undisputed claim the information described above in this § 6.3(b) (the "Initial Report Approval Order").

On or as soon as reasonably practicable after the Distribution Date, the Settlement Administrator shall distribute Promissory Notes (as described in § 2.2 and 2.3) to each Authorized Claimant whose claim was approved in the Initial Report Approval Order, in an original principal amount which is either the Authorized Claimant's Class Member's Settlement Amount or the Class Member's Estimated Settlement Amount. In the event these Promissory Notes are distributed with original principal amounts based on the Class Member's Estimated Settlement Amount, when the Class Member's Settlement Amount is determined to be final, the Settlement Administrator shall either issue supplemental Promissory Notes to each Authorized Claimant for the difference between the Class Member's Settlement Amount and the Class Member's Estimated Settlement Amount or if the Settlement Administrator holds sufficient cash and reasonably determines it to be more efficient or practical to simply pay by check to each Authorized Claimant, an amount equal to the principal and interest the Authorized Claimant would have received if a

supplemental Promissory Note had been issued to the Authorized Claimant, and in so doing the Settlement Administrator may rely on the register of registered owners maintained by the Paying Agent with respect to the Promissory Notes and may if it so chooses elect to distribute these supplemental Promissory Notes or make these supplemental payments through the Paying Agent. Such distributions shall not be delayed pending the resolution of any disputed Claimants' claims or the resolution of any appeal relating to Plaintiffs' counsel's Fee and Expense Award.

If an appeal has been taken from the Fee and Expense Award, in determining the Class Member's Estimated Settlement Amount, the Settlement Administrator shall estimate the Net Settlement Fund as if the appeal resulted in whatever result would yield the lowest Net Settlement Fund, taking into account the results of the appeal and whatever amounts may be required to fund the payment of fees and expenses of Plaintiffs' Class Counsel of Record as a result of the pending appeal, together with any consequent expenses.

Following the issuance by the Court of the Initial Report Approval order, the Settlement Administrator shall from time to time as appropriate file supplemental and additional reports providing comparable information to that in the Initial Distribution Report with respect to any disputed claims which later are determined to be Authorized Claims. As soon as reasonably practicable after the entry of an order of the Court approving any such formerly disputed claims, the Settlement Administrator shall distribute to each such Authorized Claimant a Promissory Note in the appropriate original principal amount on the same terms and with the same interest commencement and maturity dates as the other Promissory Notes previously distributed, and otherwise in accordance with the same procedures as the first group of Promissory Notes were distributed and/or supplemented by subsequent payments or Promissory Notes.

6.4 Upon the Effective Date and thereafter, and in accordance with the terms of the Stipulation and the Plan of Allocation, the Net Settlement Fund shall be distributed to Authorized Claimants, subject to and in accordance with the following:

(a) Within sixty (60) days after the mailing of the Notice each Person claiming to be an Authorized Claimant shall be required to submit to the Settlement Administrator a completed Proof of Claim and Release and all of his or her Monthly Statements from Multivest Options, Inc. substantially in the form annexed hereto as Exhibit A-3.

(b) All Proofs of Claim and Release, together with all of the Settlement Class Members' Monthly Statements, must be submitted to the Settlement Administrator by the date specified in the Proof of Claim and Release. Any Settlement Class Member who fails to file a Proof of Claim and Release and Monthly Statements by such date shall be forever barred from receiving any payment pursuant to this Stipulation but shall in all other respects be bound by the terms of this Stipulation and by the releases contained herein and the final judgment entered in the Litigation. A Proof of Claim and Release shall be deemed to have been submitted when posted if a postmark is indicated on the envelope and if it is mailed first-class postage prepaid and addressed in accordance with the instructions therein. In all other cases, a Proof of Claim and Release shall be deemed to have been submitted when actually received by the Settlement Administrator;

(c) Each Proof of Claim and Release shall be submitted to and reviewed by the Settlement Administrator, who shall determine in accordance with this Stipulation the extent, if any, to which each claim shall be allowed. Each Proof of Claim and Release shall be approved by the Settlement Administrator for the full amount of the Class Member's Settlement Amount as

defined in § 6.3(a), unless the Settlement Administrator shall have reason to believe that the Claimant is not entitled to distributions as an Authorized Claimant or that the Monthly Statements submitted are not complete and authentic, in which case the claims shall be treated as a disputed claim as provided in § 6.4(e). The Settlement Administrator shall review all Proofs of Claim and Releases and Monthly Statements submitted and make such corrections to the Proof of Claim and Release as may be required to ensure that they accurately reflect the information contained in that Settlement Class Member's Monthly Statements. Proof of Claim and Release forms and Monthly Statements which are timely submitted by Claimants and are capable of correction and completion by the Settlement Administrator to accurately reflect the information on such Claimants' Monthly Statements shall be so corrected and completed and not rejected. Copies of submitted Proofs of Claim and Release shall be made available for examination by Plaintiffs' Settlement Counsel and Defendants' counsel. Following the Distribution Date, the Settlement Administrator shall retain all Proofs of Claim and Release and other related documents until all Promissory Notes have been paid, at which time all Proofs of Claim and Release and other related documents shall be destroyed.

(d) The Settlement Administrator shall reject Proofs of Claim and Release that do not meet the requirements set forth in the Proof of Claim and Release and which are not capable of correction by the Settlement Administrator as provided in § 6.4(c). The Settlement Administrator shall notify all Claimants whose Proofs of Claim and Release have been rejected in whole or in part, setting forth the reasons therefor, and shall provide Claimants with a reasonable time to cure any defect in his/her Proof of Claim and Release. Upon demand by a Claimant, the Settlement Administrator shall provide any MultiVest

Options, Inc. Monthly Statements requested. The provision of such information shall not relieve the Claimants of their obligations to submit a Proof of Claim and Release together with the related documents required by the Proof of Claim and Release which documentation shall be satisfied by the Monthly Statements received from the Settlement Administrator if appropriate. Notwithstanding any other provision of this Stipulation, if neither the Claimant nor MultiVest Options, Inc. is able to provide copies of Claimant's Monthly Statements, the Settlement Administrator may consider other documentation provided by MultiVest Options, Inc. or Plaintiffs' Settlement Counsel to ascertain whether the information required to establish any Claimant's claim is otherwise available. Class members who request and obtain Monthly Statements from the Settlement Administrator shall have a total charge of fifty dollars ($50) for the provision of such Statements deducted from. the amount of their claim to compensate for this service. If any Claimant whose claim has been rejected and has been given an opportunity to cure his/her defect fails to do so within the time provided, the Claims Administrator will send such Claimant a final notice of rejection.

(e) If any Claimant whose claim has been finally rejected in whole or in part, desires to contest such final rejection, the Claimant must, within twenty (20) days after the date of mailing of the notice of final rejection of the Proof of Claim and Release, serve upon the Settlement Administrator a notice and statement of reasons indicating the Claimant's grounds for contesting the final rejection along with any supporting documentation, and requesting a review thereof by the Court. Any such notice and statement shall be deemed served when actually received by the Settlement Administrator. The Settlement Administrator shall thereafter present such unresolved requests, if any, for review to the Court. The procedures

for contesting rejected claims shall be provided in Exhibit A-1, The Hearing Notice.

6.5 None of Representative Plaintiffs, Settlement Class Members or Defendants or counsel for any party shall have any liability with respect to the investment, distribution, allocation or payment of the Settlement Fund, the Plan of Allocation, the determination, administration, calculation, review, approval or payment of the Settlement Class Members' claims, the payment of fees, costs and expenses, the payment or withholding of taxes, or any losses incurred in connection therewith.

6.6 Payment shall be deemed conclusive as to all Settlement Class Members. All Settlement Class Members who do not timely submit Proofs of Claim and Release shall be barred from participating in distributions from the Settlement Fund, but otherwise shall be bound by all of the terms of this Stipulation, and any judgment entered in the Litigation.

6.7 Each Claimant shall be deemed to have submitted to the jurisdiction of the Court with respect to his, her or its claim.

6.8 All proceedings with respect to the Settlement Agreement described by this Stipulation and the determination of all controversies relating thereto, including disputed questions of law and fact with respect to the validity of claims, shall be subject to the jurisdiction of the Court.

6.9 The Settlement Administrator shall provide Plaintiffs' Settlement Counsel and Defendants' counsel with copies of all reports on claims.

7. *Plaintiffs' Class Counsel of Record Attorneys' Fees and Reimbursement of Expenses*

7.1 Plaintiffs' Class Counsel of Record shall submit an application (the "Fee and Expense Application") for distribution to them from the Settlement Fund as an obligation of the Settlement Class Members of attorneys' fees and expenses, including reimbursement of Court costs and other

expenses, and the fees and expenses of any experts retained by them. Plaintiffs' Class Counsel of Record shall apply for fees in an amount not to exceed 33-1/3% of the Settlement Fund plus their costs and expenses. Plaintiffs' Class Counsel of Record will apply for payment of their fees and expenses in cash to the extent available, but in no event will any Promissory Notes be issued directly to them. Defendants will not directly or indirectly oppose Plaintiffs' Class Counsel of Record's application for fees and expenses or compensation of the Representative Plaintiffs. Any award of attorneys' fees, costs and expenses shall be paid out of the Settlement Fund and Defendants shall have no separate liability for the payment of any attorneys' fees, costs and expenses. Any portion of Plaintiffs' Class Counsel of Record fees and expenses awarded by the Court which is not paid in cash out of the cash portion of the Settlement Fund or interest earned thereon, will be paid by the Settlement Administrator out of the balance of the Settlement Fund as the fees and expenses of the Settlement Class Members and not as an obligation of the Defendants. The portion of these fees and expenses not paid in cash out of the cash portion of the Settlement Fund will be paid by the Settlement Administrator if, as and when the Settlement Administrator receives payments with respect to the Master Promissory Note, and the deferred portion of these fees and expenses will earn interest at the same rate and be paid at the same time as interest is earned and paid on the Master Promissory Note. In addition, the Settlement Administrator will demand payment at the earliest possible date, and not later than the Five Year Maturity Date referred to in the Master Promissory Note, of sufficient principal on the Master Promissory Note to pay the balance in full of these deferred fees and expenses.

7.2 The attorneys' fees, expenses and costs, including the fees of experts and consultants, as awarded by the Court, shall be paid by the Settlement Administrator to Plaintiffs' Class Counsel of Record from the Settlement Fund, as ordered,

within three (3) business days after the Court has entered an order granting final approval of this Stipulation and awarding such fees and expenses. Plaintiffs' Class Counsel of Record shall allocate the attorneys' fees among counsel for Representative Plaintiffs within their discretion, in a manner which they in good faith believe reflects the contributions of such counsel to the prosecution and settlement of the Litigation. Distribution to the Settlement Class Members out of the Net Settlement Fund of cash and Promissory Notes shall be adjusted in accordance with the Court's award of attorneys' fees and expenses. In the event that the Effective Date does not occur or the conditions set forth in § 8.2 are not satisfied or the Judgment or the order making the Fee and Expense Award is reversed or modified on appeal, and in the event that the Fee and Expense Award has been paid to any extent, then counsel for plaintiffs shall within five (5) business days from the relevant occurrence, refund to the Settlement Fund the fees, expenses and costs previously paid to them from the Settlement Fund (other than administration costs) plus interest thereon at the same rate as earned on the Settlement Fund in an amount consistent with such reversal or modification.

7.3 All attorneys' fees, costs and expenses shall be paid only from the Settlement Fund as an obligation of the Settlement Class Members and not as an obligation of Defendants. No Person shall have any claim against Defendants or their counsel arising from any distribution made substantially in accordance with this Stipulation and the Settlement Agreement contained herein or any further order of the Court. Plaintiffs' Class Counsel of Record shall indemnify Defendants for any liability, fee, cost or expense, including any fees, costs or expenses incurred for the defense of any claim, by reason of any claim against them by any Plaintiffs' Class Counsel of Record for any attorneys' fees, cost or expenses arising out of this Litigation.

7.4 The procedure for and the allowance or disallowance by the Court of any applications by any of the Plaintiffs' Class

Counsel of Record for attorneys' fees, costs and expenses, including the fees of experts and consultants, to be paid out of the Settlement Fund, are to be considered by the Court separately from the Court's consideration of the fairness, reasonableness and adequacy of the Stipulation, and any order or proceedings relating to the Fee and Expense Application, or any appeal from any order relating thereto or reversal or modification thereof, shall not operate to terminate or cancel the Stipulation, or affect or delay the finality of the Judgment approving the Stipulation and the settlement of the Litigation set forth herein.

8. *Conditions of Settlement, Effect of Disapproval, Cancellation or Termination*

8.1 In the event that the Settlement Agreement contemplated hereby does not receive either preliminary or Final approval, neither defendants nor plaintiffs shall argue that The Hon. Ursula Ungaro-Benages' review of this settlement or holding hearings on preliminary or Final approval of the settlement or any other action taken by the Court with respect to this Stipulation or the proposed Settlement constitutes a ground for disqualification from presiding over further proceedings in this matter. Prior to submitting any portion of this Settlement Agreement and Stipulation to The Hon. Ursula Ungaro-Benages, the parties shall obtain her assurance that as a result of reviewing the settlement and conducting hearings on preliminary or final approval, she will not, sua sponte, disqualify herself from further trial and proceedings in this action. Absent such a commitment from The Hon. Ursula Ungaro-Benages, the parties shall arrange for the hearing on preliminary and final approval of the Settlement Agreement and this Stipulation by another federal judge.

8.2 While this Stipulation is binding upon the parties from the time of its execution, the Settlement contemplated by this Stipulation, including the releases and payments to the Settlement Class Members and Plaintiffs' Class Counsel of

Record, is conditioned on the occurrence of all of the following events, and the date upon which the last of these events has occurred is the "Effective Date".

(a) Defendants have timely made their contributions to the Settlement Fund as required by § 2.2 above;

(b) The Court has entered the Hearing Order, as required by § 4.1, above;

(c) The Court has entered the Final Order and Judgment, or a judgment substantially in the form of Exhibit "B";

(d) The Judgment has become Final, as defined in § 1.11, above;

(e) The Conveyance Litigation has been dismissed with prejudice and without costs; and

(f) William Waters and Linda Bartholomew have released all claims assigned to them by the Receiver for MultiVest Options, Inc.

8.3 If all of the conditions specified in § 8.2(b)—(f) are not met, then the Stipulation shall be canceled and terminated unless Plaintiffs' Settlement Counsel and counsel for Defendants mutually agree in writing to proceed with the Stipulation. In the event the Defendants fail to make the contribution as to the Settlement Fund as required by §§ 2.2 and 2.3, the Court and The Hon. Ursula Ungaro-Benages shall have jurisdiction to order specific performance of the Stipulation.

8.4 In the event the Stipulation fails to receive preliminary approval of the Court, the trial which is pending before The Hon. Ursula Ungaro-Benages shall continue as though this Stipulation and negotiations relating to it had never come into existence. In such event, the terms and provisions of the Stipulation, shall have no further force and effect and shall not be used in this Litigation or in any other proceeding for any purpose. No order of the Court or modification or reversal on

appeal of any order of the Court concerning the amount of any attorneys' fees, costs, expenses and interest awarded by the Court to the Representative Plaintiffs or Plaintiffs' Class Counsel of Record shall constitute grounds for cancellation, alteration or termination of the Stipulation.

8.5 If the Effective Date does not occur, or if the Stipulation is terminated pursuant to its terms, neither the Representative Plaintiffs nor any of their counsel nor the Settlement Administrator shall have any obligation to repay any amounts actually and properly disbursed for notice and administration. In addition, any expenses already incurred for notice and administration purposes pursuant to § 3.1 hereof at the time of such termination or cancellation but which have not been paid, shall be paid by the Settlement Administrator in accordance with the terms of the Stipulation prior to the balance being refunded to Defendants.

8.6 Upon failure to satisfy the conditions set forth in § 8.2 as determined by the Court, the Settlement Administrator shall repay the amounts remaining in the Settlement Fund to Defendant James Grosfeld within five (5) business days of the Court's determination of the failure to meet such condition(s), less such costs as have been incurred but not then paid with respect to notice and administration.

9. *Final Order and judgment*

9.1 If the Court approves the Stipulation as provided herein, at the time of or prior to the Settlement Hearing, the parties shall submit for entry by the Court a proposed Final Order and Judgment, substantially in the form annexed hereto as Exhibit B providing, among other things, as follows:

(a) Approving this Stipulation, as provided herein, as fair, reasonable, adequate, and in the best interests of the Settlement Class and the Settlement Class Members and directing consummation of the Stipulation in accordance with all of its terms and conditions;

(b) Dismissing the Litigation with prejudice and on the merits, without costs, and extinguishing all Released Claims by the Settlement Class Members against all Released Persons;

(c) Permanently barring and enjoining each and every Settlement Class Member from asserting, either directly, individually, or in a representative or derivative capacity, against any of the Released Persons, any Released Claim;

(d) Deeming each Defendant to have released and discharged each other Defendant of any of Plaintiffs' claims or of any liability therefor, including claims for indemnification or contribution, and barring and enjoining the assertion of any such claim.

9.2 The Court shall retain jurisdiction for the purpose of, *inter alia*, effectuating this Stipulation and resolving any disputes hereunder, and awarding counsel fees and expenses.

10. *Miscellaneous Provisions*

10.1 The parties intend this Stipulation to be a final and complete resolution of all disputes between them with respect to the Litigation and the Conveyance Litigation. In addition, the Defendants agree that the amount paid to the Settlement Fund reflects a good faith settlement of the claims of the Representative Plaintiffs and the Settlement Class, reached voluntarily after consultation with competent legal counsel.

10.2 Plaintiffs' Settlement Counsel and counsel for Defendants shall submit this Stipulation to The Hon. Ursula Ungaro-Benages as soon as possible and request her to suspend the trial pending consideration of the Stipulation. In the event that the Court does not suspend the trial to consider the Stipulation, it shall nonetheless continue to be in effect until the Court is prepared to charge the jury. If the Court proceeds to charge the jury prior to deciding whether or not to approve this Stipulation, it shall be null and void and of no further effect.

10.3 Neither the Stipulation, nor any act performed or document executed pursuant to or in furtherance of the Stipulation: (i) is or may be deemed to be or may be used as an admission of, or evidence of, the validity of any Released Claim, or of any wrongdoing or liability of the Defendants; or (ii) is or may be deemed to be or may be used as an admission of, or evidence of, any fault or omission of any of the Defendants in any civil, criminal or administrative proceeding in any court, administrative agency or other tribunal, other than in such proceedings as may be necessary to consummate or enforce the Stipulation, or the Final Order and Judgment, except that the Defendants may file the Stipulation and/or the Final order and Judgment in any action that may be brought against them in order to support their defense therein, including, without limitation, any defense or counterclaim based on principles of res judicata, collateral estoppel, release, good faith settlement, judgment bar or reduction or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim. The Defendants have denied and continue to deny each and all of the claims alleged in the Litigation.

10.4 To the extent permitted by law, all agreements made and orders entered during the course of the Litigation relating to the confidentiality of information shall survive this Stipulation. Plaintiffs' Class Counsel of Record and Plaintiffs' Settlement Counsel shall deliver to the Settlement Administrator all documents produced by any party during the course of this Litigation not later than the Effective Date. Counsel may retain documents generated by them during the course of this Litigation but shall use such documents only for the purpose of this Litigation. Plaintiffs' Class Counsel of Record and Plaintiffs' Settlement Counsel shall deliver to counsel for Defendants or destroy all lists identifying the Plaintiff Class Members not later than the Effective Date provided, however, Plaintiff's Settlement Counsel may, at the same time, furnish the Settlement Administrator with address

information concerning Class Members. Plaintiffs' Settlement Counsel and Plaintiffs' Class Counsel of Record represent that they have not disclosed the identity of the plaintiffs (other than the named plaintiffs) or Settlement Class Member except as required for purposes of this Litigation and shall not disclose the identity of any such persons at any time in the future except as required for the consummation of this Settlement.

10.5 All of the Exhibits to the Stipulation and the exhibits to the Document Letter are fully incorporated herein by this reference.

10.6 Except as provided in § 10.8, the Stipulation may be amended or modified only by a written instrument signed by or on behalf of all Settling Parties or their respective successors-in-interest.

10.7 The Stipulation and the Exhibits attached hereto and the ancillary documents attached to the Document Letter constitute the entire agreement among the parties hereto and no representations, warranties or inducements have been made to any party concerning the Stipulation or its Exhibits other than the representations, warranties and covenants contained and memorialized in such documents.

10.8 Plaintiffs' Settlement Counsel, on behalf of the Settlement Class, are authorized to take all appropriate action required or permitted to be taken by the Settlement Class pursuant to the Stipulation to effectuate its terms and also are expressly authorized to enter into any modifications or amendments to the Stipulation on behalf of the Settlement Class which they deem appropriate.

10.9 Each counsel or other Person executing the Stipulation or any of its Exhibits on behalf of any party hereto hereby warrants that such person has the full authority to do so.

10.10 The Stipulation may be executed in one or more counterparts. All executed counterparts and each of them shall

be deemed to be one and the same instrument. A complete set of original executed counterparts shall be filed with the Court.

10.11 The Stipulation shall be binding upon, and inure to the benefit of, the heirs, legal representatives, successors and assigns of all parties hereto, including the Settlement Class Members.

10.12 The Court and The Hon. Ursula Ungaro-Benages shall retain jurisdiction with respect to implementation and enforcement of the terms of the Stipulation, and all parties hereto submit to the jurisdiction of the Court for purposes of implementing and enforcing the settlement embodied in the Stipulation.

10.13 The Stipulation and the Exhibits hereto shall be considered to have been negotiated, executed and delivered, and to be wholly performed, in the State of Florida, and the rights and obligations of the parties to the Stipulation shall be construed and enforced in accordance with, and governed by, the internal, substantive laws of the State of Florida without giving effect to that State's choice of law principles.

10.14 The Representative Plaintiffs, William Waters and Linda Bartholomew, represent that they have full authority to dispose of certain claims assigned to plaintiffs by the Receiver of MultiVest Options, Inc. pursuant to an Assignment Agreement dated as of December 28, 1993 and undertakes to release all claims so assigned against all Released Persons. Plaintiffs' Settlement Counsel and Defendants shall cooperate to secure the payment of any available funds held by the Receiver in to the Settlement Fund. The payment of these funds shall not affect the contribution by Defendants of the $40,000,000 to the Settlement Fund.

Dated: January 17, 1997

International Precious Metals Corporation
MultiVest Inc.
James Grosfeld, Individually and as Trustee of the
James Grosfeld Trust
MultiVest Real Estate, Inc.
S. S. Melbourne, Inc.
The Cypress Group, Inc.

by

_____
(Counsel for Defendants)

James Grosfeld

by

_____
James Grosfeld

William Waters and Linda Bartholomew, individually and on behalf of all Settlement Class Members

by

_____
(Representative Class Counsel)

William Waters and Linda Bartholomew, as assignees of certain claims assigned to them by the Receiver for MultiVest Options, Inc. pursuant to an Assignment Agreement dated as of December 29, 1993.

by

_____
Neil A. Goteiner, Esq., as Counsel
for Assignee Waters and Bartholomew

_____

John L. Cooper
(As Plaintiffs' Settlement Counsel and on behalf of all Plaintiffs' Settlement Counsel and as Plaintiffs' Class Counsel of Record)

_____

Eric G. Lipoff
Raring & Lipoff
3070 Bristol, Suite 680
Costa Mesa, CA 92626
(One of Plaintiffs' Class Counsel of Record)

_____

Ronald N. Ravikoff
Zuckerman, Spaeder, Taylor & Evans
201 South Biscayne Boulevard, Suite 900
Miami, FL 33131
(One of Plaintiffs' Class Counsel of Record)

APPENDIX H

Exhibit A-1 to Stipulation of Settlement, dated January 17, 1997: [Draft] Notice of Proposed Settlement of Class Action, Settlement Hearing, and Right to Appear

Exhibit A-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIAM WATERS and LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated,, Plaintiff, -against- INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., et al., Defendants.	Case No. 90-6863 Civ-UNGARO- BENAGES

NOTICE OF PROPOSED SETTLEMENT OF
CLASS ACTION SETTLEMENT HEARING,
AND RIGHT TO APPEAR.

TO: ALL PERSONS WHO OPENED CUSTOMERS ACCOUNTS AT MULTIVEST OPTIONS, INC. AND TRADED EXCHANGE TRADED OPTIONS AT ANY TIME DURING THE PERIOD FROM JUNE 1, 1985 THROUGH OCTOBER 31, 1989.

PLEASE READ THIS NOTICE CAREFULLY AND IN ITS ENTIRETY. YOUR RIGHTS MAY BE AFFECTED BY LEGAL PROCEEDINGS IN THIS LITIGATION. IF THE SETTLEMENT IS APPROVED, CLASS MEMBERS WHO WISH TO SHARE IN THE SETTLEMENT PROCEEDS MUST TIMELY SUBMIT A VALID PROOF OF CLAIM AND RELEASE FORM. IF THE COURT APPROVES THE PROPOSED SETTLEMENT, YOU WILL BE FOREVER

BARRED FROM CONTESTING THE FAIRNESS, REASONABLENESS, OR ADEQUACY OF THE PROPOSED SETTLEMENT OR FROM PURSUING THE CLAIMS SETTLED HEREIN.

NOTICE IS HEREBY GIVEN, pursuant to Rule 23 of the Federal Rules of Civil Procedure and an Order of the United States District Court for the Southern District of Florida (the "Court") dated ___, 1997, to inform you (a) of the proposed settlement of the above-captioned class action (the "Litigation"); and (b) that a hearing will be held before The Honorable Ursula Ungaro-Benages, of the United States Court for the Southern District of Florida, located at 301 N. Miami Avenue, in Room ___, Miami, Florida 33128, on ___, 1997 (the "Settlement Hearing"), to determine whether the proposed settlement (the "Settlement") of the Litigation is fair, reasonable, and adequate; and for purposes of determining the amount and method of payment of attorneys' fees and reimbursement of expenses to be awarded to plaintiffs' counsel. In its Order of ___, 1997, the Court granted preliminary approval of the Stipulation of Settlement dated January 17, 1997 and the exhibits incorporated therein, subject to further confirmation at the Settlement Hearing.

I. BACKGROUND OF THE LITIGATION

1. The action of William Waters and Linda Bartholomew v. International Precious Metals Corp., et al., No. 90-6863 is currently in trial in the Federal District Court of the Southern District of Florida before The Hon. Ursula Ungaro-Benages. On April 23, 1990, Plaintiffs filed a complaint in the United States District Court for the Northern District of California. On October 17, 1990, this case was transferred to the Southern District of Florida and assigned the foregoing case number.

2. Plaintiffs allege that Defendants violated Section 4c(b) and 22 of the Commodity Exchange Act ("CEA"), as amended, 7 U.S.C. §§ 6c(b) and 25, and rules and regulations promulgated thereunder; the Racketeer Influenced and Corrupt

Organizations Act ("RICO"), 18 U.S.C. §§ 1961 et seq. and provisions of the Florida Securities and Investor Protection Act, Fla. Stat §§ 517.211, 517.301 and 517.312. Plaintiffs further allege common law claims for fraud, aiding and abetting a breach of fiduciary duty, inducing breach of contract, negligent misrepresentation, and constructive fraud. One count of the complaint alleges violations of the Uniform Fraudulent Transfer Act, Fla. Stat §§ 726.01, et seq.

3. The primary Defendants in this action are MultiVest Inc., the indirect parent corporation of MultiVest Options Inc. and an individual defendant owning most of the stock of MultiVest Inc. (the "Individual Defendant"). MultiVest Inc. was at all relevant times 100% owned by the Individual Defendant and a trust for that Defendant's child. Also named as Defendants are MultiVest Real Estate Inc., S. S. Melbourne Inc., and Cypress Group Inc. who are named solely with respect to claims alleging fraudulent transfers.

4. The Defendants deny and disclaim all liability to the Representative Plaintiffs or the Settlement Class and all of the allegations of wrongdoing directed at them in this Litigation.

II. SUMMARY OF PROPOSED SETTLEMENT

A. Terms of the Settlement

5. The terms of the Settlement are set forth in a Stipulation of Settlement (the "Stipulation" or "Settlement Agreement") dated January 17, 1997, which has been filed with the Court. All of the terms of the Stipulation are hereby incorporated by reference. The capitalized terms not otherwise defined in this Notice have the meanings given to them in the Stipulation. The Stipulation, which requires approval by the Court, provides that the Individual Defendant shall deposit the sum of $40,000,000, the Settlement Fund, by delivery actually made to the Settlement Administrator contemporaneously with the entry of an order by the United States District Court for the Southern District of Florida preliminarily approving the

Stipulation. On January [ ], 1997, the Court entered its Order granting preliminary approval of the Stipulation. The total principal amount of $_____, consisting of cash plus the face value of the Master Promissory Note, as provided below in this section, has been deposited with the Settlement Administrator and constitutes the Settlement Fund. As described below, to facilitate this Settlement Agreement, there will initially be a single Master Promissory Note issued by the Individual Defendant. At the time of distributions to the Authorized Claimants, described below, there will be substituted for portions of this Master Promissory Note, individual promissory notes ("Promissory Notes") in the appropriate amounts payable to each Authorized Claimant. The Settlement Administrator and a bank paying agent will administer these individual Promissory Notes jointly with the Master Promissory Note. These individual Promissory Notes will be secured by the same security, will be cross-defaulted and cross-collateralized with and will otherwise be on the same economic terms as the Master Promissory Note. The terms of these notes and the irrevocable letter of credit and other security for them and the terms of their administration are provided in detail in the Stipulation and its Exhibits and a Document Letter. The following is a summary of the economic terms of the Master Promissory Note and also will apply to the Promissory Notes in general.

Until paid in full the Master Promissory Note will bear interest at [rate certain to be inserted at time notice is prepared, as the rate will then be known] per annum, which is the annual yield paid by NDB Bank, Detroit, Michigan on $100,000 denomination FDIC-insured five-year certificates of deposit on the date of the Stipulation, with interest commencing to accrue on the Distribution Date described below. Accrued interest will be paid annually on December 15, commencing December 15, 1997 and at maturity. The Master Promissory Note will mature on the tenth anniversary of the Distribution Date, which is the tenth business day after Court approves the Settlement Class

Members' Claims which are undisputed, pursuant to the initial report of the Settlement Administrator. However, the Master Promissory Note will be payable on demand on the day after the fifth anniversary of the Distribution Date, but if payment is not then demanded will continue to be due on the tenth anniversary of the Distribution Date. The Master Promissory Note will be prepayable by its maker at any time on not more than 60 or less than 30 days prior notice. The Master Promissory Note will initially be secured by marketable securities with a fair market value of at least 105% of (i) the principal balance, plus (ii) not less than one year's interest on the principal balance. Within 30 days after the Stipulation is first presented to the Court for preliminary approval, these marketable securities will be replaced as security for the Master Promissory Note and any issued Promissory Notes with an irrevocable letter of credit in an initial amount equal to the outstanding principal balance on the Master Promissory Note and the Promissory Notes (without any duplication) plus at least one year's interest, with the irrevocable letter of credit to be issued by NBD Bank, Detroit, Michigan or a bank of comparable creditworthiness. Thus, while the Master Promissory Note will be secured on an interim basis by marketable securities pursuant to a Note Administration and Pledge Agreement, it is contemplated that the individual Promissory Notes issued to Authorized Claimants will be secured by an irrevocable letter of credit. This irrevocable letter of credit will be immediately drawable if any sum due is not paid with respect to the note, or if the irrevocable letter of credit is not renewed within sixty (60) days of its expiration or on other defined events of default. The irrevocable letter of credit will remain outstanding until the obligations under the Master Promissory Note and the Promissory Notes have been paid in full. The amount of the irrevocable letter of credit will be reduced form time to time as the outstanding amount of principal on the Master Promissory Note and the Promissory Notes is reduced in accordance with the Plan of Allocation described below or otherwise as the notes are paid.

On or as soon as practicable after the Distribution Date, the Settlement Administrator will distribute to each Settlement Class Member, who has timely submitted a completed Proof of Claim and Release and whose claim was not disputed by the Settlement Administrator and is approved by the Court, one or more of a series of Promissory Notes issued by a bankruptcy remote corporation, secured by the irrevocable letter of credit, and otherwise on the same economic terms as the Master Promissory Note. The Master Promissory Note will be reduced by the amounts of these Promissory Notes which are issued. Any claims disputed by the Settlement Administrator which are later determined in accordance with the procedures of the Stipulation to be Authorized Claims will be treated in the same manner, and the Authorized Claimants will be issued Promissory Notes in the appropriate amount on the same terms secured by the same irrevocable letter of credit, with the same interest commencement date and maturity as all the other Promissory Notes. The principal amount of these Promissory Notes issued to each Authorized Claimant will be determined in accordance with the Plan of Allocation described below. Any dispute with respect to disputed claims or to the award of fees and expenses to Plaintiffs' Counsel of Record will not operate to terminate or cancel the Stipulation or affect or delay the finality of the Judgment approving the Stipulation or the distribution of appropriately estimated amounts, as approved by the Court, with respect to undisputed Authorized Claims.

A Paying Agent, who will be First National Bank of Chicago or another bank, will maintain a register of the holders of each of the issued Promissory Notes containing the name, current mailing and street address of the owner of each of the Promissory Notes, which will be open to inspection by the note holders at all reasonable times upon advance notice. Absent manifest error, the owners of the Promissory Notes as shown on this note register will be considered the absolute owner of the note for all purposes. Once a note is shown as paid in full

on this register it will be deemed canceled. The Promissory Notes will be transferable only on this note register.

These Promissory Notes will not be restricted to prevent them from being sold or discounted to other persons or financial institutions and will be transferable to the heirs and assigns of Authorized Claimants.

The only risk on the Master Promissory Note or the Promissory Notes to which the note holders shall be exposed is the failure of the bank issuing the irrevocable letter of credit.

6. The Stipulation provides for the Settlement Administrator to administer the Settlement Fund, to invest the cash held in United States Government Securities, and to treat the Settlement Fund as a "qualified settlement fund" within the meaning of Treas. Reg. Section 1.568B-1 and to make appropriate tax elections in this regard. All taxes and tax detriments related to the Settlement Fund and the expenses of preparing and filing tax returns, notices, and tax advice will be paid out of the Settlement Fund and not by the Defendants. These and other expenses to be paid out of the Settlement Fund before distribution to Authorized Claimants are described in the Stipulation and include those described in the following two numbered paragraphs. The remainder of the Settlement Fund after deduction of all fees, costs, expenses, taxes and other charges in accordance with the Stipulation is referred to as the "Net Settlement Fund".

7. The Settlement Fund will be reduced by such amounts as the Settlement Administrator requires to pay the costs and expenses reasonably incurred in connection with providing notice to the Class, administering the Settlement Fund processing Proof of Claim and Release forms and paying escrow fees and costs, if any, and distributing the Settlement Fund to Authorized Claimants. The Settlement Administrator may contract with an outside service provider to obtain those services.

8. The Settlement Fund will also be reduced by such amounts as may be awarded by the Court in legal fees, expenses and costs, including the fees of experts and consultants, as awarded by the Court. Counsel for plaintiffs will request the Court's approval of a fee of thirty-three and one-third (33-1/3%) percent of the Settlement Funds plus reimbursement of expenses ("Fee and Expense Award"). Counsel for plaintiffs will request that their fees be paid in cash to the extent available. The Court will determine the portion of the Fee and Expense Award to be paid out of the cash portion of the Settlement Fund. Any portion of the Fee and Expense Award which is not paid in cash out of the cash portion of the Settlement Fund or interest earned thereon, will be paid by the Settlement Administrator out of the balance of the Master Promissory Note if, as and when received and will earn interest at the same rate and be paid at the same time as interest is earned and paid on the Master Promissory Note and the Promissory Notes. In addition, the Settlement Administrator will demand payment at the earliest possible date, and not later than the day after the fifth anniversary of the Distribution Date, of sufficient principal on the Master Promissory Note to pay the balance in full of these deferred fees and expenses. Defendants will not oppose plaintiffs' counsel's application for the Fee and Expense Award. Distribution to the Settlement Class Members out of the Net Settlement Fund of cash and Promissory Notes shall be adjusted in accordance with the Court's award of attorneys' fees and expenses. The procedure for and the allowance or disallowance by the Court of any application by any of the Plaintiffs' Class Counsel of Record for attorneys' fees, costs and expenses, including the fees of experts and consultants, to be paid out of the Settlement Fund, are to be considered by the Court separately from the Court's consideration of the fairness, reasonableness and adequacy of the Stipulation.

9. If the Settlement is approved by the Court, judgment will be entered dismissing the claims in the Litigation against

the Defendants with prejudice, releasing all claims which were or might have been made in this Litigation against the Defendants and the Related Parties, and barring any further action by the Settlement Class Members against Defendants and the Related Parties.

B. Settlement Negotiations and the Position of the Parties

10. Counsel for the parties engaged in extensive arm's-length negotiations that culminated in the Settlement. Plaintiffs' Settlement Counsel has conducted an examination into and an evaluation of the law and facts, including the facts made available through discovery relating to the matters set forth in the complaints in order to determine how best to confer a substantial benefit upon Settlement Class Members, in light of the substantial obstacles to, and risks of, establishing liability. In connection with that examination, they have determined that the Settlement is fair, adequate and reasonable and in the best interests of the Settlement Class Members in light of the obstacles to, and risk of, establishing liability.

11. Based upon discovery and their investigation and evaluation of the facts and law relating to the matters set forth in the Compliant, Plaintiffs' Settlement Counsel have concluded that: (i) there are obstacles to overcome in establishing liability; (ii) the attendant risks of litigation, especially in complex actions such as these, as well as the difficulties and delays inherent in such litigation, could delay or eliminate any recovery; (iii) the desirability of permitting the Stipulation to be promptly consummated according to its terms is substantial; and (iv) adequate resolution of the Litigation as set forth in the Stipulation is in the best interests of the Settlement Class Members.

12. Each Defendant denies the material allegations of the Complaint, as to him, her or it, and denies any and all

wrongdoing or liability with respect to any and all facts and claims alleged in the Litigation as to him, her or it. Defendants consider it desirable that the Litigation be settled and dismissed because the Settlement will: (i) halt the substantial expenses, inconvenience, and distraction of continued litigation; (ii) extinguish on the terms provided herein the claims against the Defendants; and (iii) confer a substantial benefit upon Defendants, including, without limitation, the avoidance of further expense and disruption of affairs. The Court has not determined the merits of the claims against or the defenses of the Defendants.

C. Releases

13. Upon final approval of the Court, subject to the contingencies in the Stipulation, each of the Settlement Class Members shall be deemed to have, and by operation of the Final Order and Judgment shall have, fully, finally, and forever released, relinquished and discharged all Released Claims (including "Unknown Claims") against the Released Persons, whether or not such Settlement Class Member executes and delivers the Proof of Claim and Release form.

14. Upon final approval of the Court, subject to the contingencies in the Stipulation, each of the Released Persons shall be deemed to have, and by operation of the Final Order and Judgment shall have, fully, finally, and forever released, relinquished and discharged each and all of the Settlement Class Members and counsel to the Representative Plaintiffs from all claims (including "Unknown Claims"), arising out of, relating to, or in connection with the institution, prosecution, assertion, settlement or resolution of the Litigation or the Released Claims.

15. With respect to any and all Released Claims, including Unknown Claims, upon the final approval of the Court and subject to the contingencies in the Stipulation, each of the Settlement Class Members shall be deemed to have, and by operation of the Final Order and Judgment shall have, expressly

waived and relinquished, to the fullest extent permitted by law, the provisions, rights, and benefits of §1542 of the California Civil Code (which provides: "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his Settlement with the debtor.") or any similar statute or law.

16. The Settlement Class Members may hereafter discover facts in addition to or different from those which he, she or it now knows or believes to be true with respect to the subject matter of the Released Claims, but the Settlement Class Members, upon the Effective Date, shall be deemed to have, and by operation of the Final Order and Judgment shall have, fully, finally, and forever settled and released any and all Released Claims, including Unknown Claims, known or unknown, suspected or unsuspected, contingent or non-contingent, whether or not concealed or hidden, which now exist, or heretofore have existed upon any theory of law or equity now existing or coming into existence in the future, including, but not limited to, conduct which is negligent, intentional, with or without malice, or a breach of any duty, law or rule, without regard to the subsequent discovery or existence of such different or additional facts.

17. Pending final determination of whether the Settlement should be approved, no one of the Representative Plaintiffs, any Settlement Class Member, any counsel for the Representative Plaintiffs or any Settlement Class Member, either directly, representatively, or in any other capacity, shall commence or prosecute against any of the Released Persons, any action or proceeding in any Court or tribunal asserting any of the Released Claims.

18. In the event that any Settlement Class Member shall thereafter bring any action involving any Released Claim against any party, such Class Member shall indemnify any Released Person who may be made a defendant in any such

Litigation against any liability or expense arising from any such litigation, whether by reason of contribution, indemnity, attorneys' fees, defense costs or any other liability, cost, fee or expense.

III. EFFECTIVE DATE

19. The Settlement will become Effective at such time as the Final Order and Judgment entered by the Court finally approving the Settlement shall become Final and not subject to appeal, and the other conditions identified in the Stipulation shall have been satisfied, as set forth in the Stipulation (the "Effective date"). If for any reason any of the contingencies set forth in the Stipulation are not met or complied with strictly in accordance with its terms, the Settlement may be terminated.

IV. CLASS MEMBERSHIP, FILING PROOF OF CLAIM AND RELEASE, AND PLAN OF ALLOCATION

A. Filing Proof of Claim and Release

20. IF YOU ARE A SETTLEMENT CLASS MEMBER, TO BE ELIGIBLE TO PARTICIPATE IN THE DISTRIBUTION OF THE SETTLEMENT FUND, YOU MUST COMPLETE AND SIGN THE ATTACHED PROOF OF CLAIM AND RELEASE FORM AND SEND IT, TOGETHER WITH ALL OF YOUR MONTHLY STATEMENTS FROM MULTIVEST OPTIONS, INC. (or its predecessor IPMC Options, Ltd.) BY PREPAID FIRST CLASS MAIL POST-MARKED ON OR BEFORE _____, 1997 ADDRESSED AS FOLLOWS:

The Garden City Group
Settlement Administrator
MultiVest Options, Inc. Class Action
P.O. Box XXXX
Garden City, NY 11530

IF YOU ARE A SETTLEMENT CLASS MEMBER AND YOU DO NOT FILE A PROPER PROOF OF CLAIM FORM AND RELEASE YOU WILL NOT SHARE IN THE SETTLEMENT FUND BUT YOU WILL BE BOUND BY THE FINAL ORDER AND JUDGMENT OF THE COURT DISMISSING THE LITIGATION AND ALL CLAIMS AND POTENTIAL CLAIMS AS SET FORTH ABOVE UNLESS YOU HAVE PREVIOUSLY TAKEN ACTION TO EXCLUDE YOURSELF FROM THE SETTLEMENT CLASS. IF YOU ARE A MEMBER OF THE SETTLEMENT CLASS, ANY COMMENTS OR OBJECTIONS CONCERNING THE STIPULATION OR REQUESTS TO PARTICIPATE IN THE SETTLEMENT HEARING MUST BE SUBMITTED IN WRITING, ACCOMPANIED BY A SUPPORTING MEMORANDUM, AND FILED WITH THE COURT BEFORE _____, 1997, AS DESCRIBED IN PARAGRAPH 34 BELOW.

21. For purposes of the Settlement,

(a) "Claimant" means any Settlement Class Member who files a Proof of Claim and Release.

(b) "Authorized Claimant" means any Settlement Class Member whose claim for recovery has been allowed pursuant to the terms of the Stipulation.

(c) "Released Persons" or "Released Parties" means each and all of the Defendants and their Related Parties, as defined in the Stipulation, including without limitation MultiVest Options, Inc.

22. Within sixty (60) days after the mailing of this Notice, each Person claiming to be an Authorized Claimant shall submit to the Settlement Administrator a completed Proof of Claim and Release and all Monthly Statements received from MultiVest Options, Inc. Settlement Class members may obtain copies of their Monthly Statements from the Settlement Administrator by written request addressed, first class postage

prepaid, to the Settlement Administrator at the address shown above. A charge of $50 will be deducted from distributions to Settlement Class Members requesting copies of their Monthly Statements.

23. All Proofs of Claim and Release must be submitted to the Settlement Administrator by the date specified in the Proof of Claim and Release. Any Settlement Class Member who fails to file a properly completed and signed Proof of Claim and Release and Monthly Statements by such date shall be forever barred form receiving any payment pursuant to the Stipulation but shall in all other respects be bound by the terms of the Stipulation and by the releases contained therein and the Final Order and Judgment entered in the Litigation. A Proof of Claim and Release shall be deemed to have been submitted when posted if a postmark is indicated on the envelope and if it is mailed first-class postage prepaid and addressed in accordance with the instructions therein. In all other cases, a Proof of Claim and Release shall be deemed to have been submitted when actually received by the Settlement Administrator.

24. Each Proof of Claim and Release submitted will be reviewed by the Settlement Administrator, who shall determine in accordance with the Stipulation the extent, if any, to which each claim shall be allowed, subject to final review by the Court. The Settlement Administrator shall review all timely submitted Proofs of Claim and Releases and Monthly Statements, and make such corrections to the Proofs of Claim and Release as may be required to ensure that they accurately reflect the information contained in such Claimant's Monthly Statements. Copies of submitted Proofs of Claim and Release shall be made available for examination by Plaintiffs' Settlement Counsel and Defendants' counsel. Following the Distribution Date, the Settlement Administrator shall retain all Proofs of Claim and Release and other related documents until payment of the Promissory Notes issued to Settlement Class Members, at which time all Proofs of Claim and Release and

other related documents may be destroyed or delivered to Defendants, at their expense and option.

25. The Settlement Administrator shall reject Proofs of Claim and Release that do not meet the requirements set forth in the Proof of Claim and Release. The Settlement Administrator and Release shall notify all Claimants whose Proofs of Claim and Release have been rejected in whole or in part, setting forth the reasons therefor, and shall provide Claimants with a reasonable time to cure any defect in his/her Proof of Claim and Release. If any Claimant whose claim has been rejected and has been given an opportunity to cure his/her defect fails to do so within the time provided, the Settlement Administrator will send such Claimant a final notice of rejection.

26. If any Claimant whose claim has been finally rejected in whole or in part, desires to contest such final rejection, the Claimant must, within twenty (20) days after the date of mailing of the notice of final rejection of the Proof of Claim and Release, serve upon the Settlement Administrator a notice and statement of reasons indicating the Claimant's grounds for contesting the final rejection along with any supporting documentation, and requesting a review thereof by the Court. Any such notice and statement shall be deemed served when actually received by the Settlement Administrator. The Settlement Administrator shall thereafter present such unresolved requests, if any, for review to the Court.

B. Plan of Allocation of Settlement Proceeds

27. If the Settlement is approved by the Court, the Settlement Administrator shall administer, verify and calculate the claims submitted by Settlement Class Members and shall oversee distribution of the Net Settlement Fund pursuant to the Plan of Allocation (Defined below) to Authorized Claimants.

28. On and after the Settlement Effective Date the Settlement Fund shall be applied as follows:

(a) To pay all the costs and expenses reasonably incurred in connection with providing notice to the Class, processing Proofs of Claim and Release forms, and calculating, administering and distributing payments from the Settlement Fund to the Settlement Class;

(b) To pay the Taxes and Tax Expenses owed by the Settlement Fund;

(c) To pay fees, expenses and costs for Plaintiffs' Class Counsel of Record and the Settlement Class Members (the "Fee and Expense Award"), in accordance with the orders of the Court;

(d) To distribute the Settlement Fund after deduction of attorneys' fees and all costs and expenses (the "Net Settlement Fund") to Authorized Claimants pursuant to the Plan of Allocation; and

(e) If the Settlement Administrator determines that he no longer requires any amount of the cash or the Master Promissory Note to complete the payment of fees, expenses and distributions contemplated by the Stipulation as a result of the final claim determination or any interim determination, he shall so advise the payor of the Master Promissory Note and return any excess cash not less than ten (10) and note more than fifteen (15) days after such determination unless otherwise ordered by the Court. The Settlement Administrator may, upon request by counsel for Plaintiffs or Defendants, prepare interim reports setting forth the amounts of cash and Promissory Notes, if any, no longer required for the administration and distribution of the Settlement Fund.

29. Pursuant to the Plan of Allocation, the Settlement Administrator shall determine the Net Settlement Fund by subtracting from the Settlement Fund, the fees and expenses of

counsel for the Representative Plaintiffs and the Settlement Class, taxes, expenses for notice and administration, and other expenses as provided in the Stipulation. The Settlement Administrator shall determine each Settlement Class Member's Recognized Loss and the Aggregate Recognized Loss. Recognized Loss is the sum of all payments made by a Settlement Class Member to MultiVest Options, Inc. (hereinafter including its predecessor, IPMC Options, Ltd.) reduced by all payments received form MultiVest Options, Inc. and the amount of cash and value of unexpired options in that Class Member's account as of October 31, 1989 or the last month in which a Class Member had an account at MultiVest Options, Inc., if earlier than October 31, 1989, all as shown on the Class Member's Monthly Statements. The Settlement Administrator shall divide the Net Settlement Fund by the $119,931,383.40 to determine the Distribution Ratio for Settlement Class Members. The Settlement Administrator shall determine the distribution to be made to each Settlement Class Member (the "Class Member's Settlement Amount") by multiplying that Settlement Class Member's Recognized Loss by the Distribution Ratio. Authorized Claimants are expected to receive not more than ____% of their Recognized Loss, reduced by any attorneys' fees, taxes, costs and expenses of administering the Settlement Fund. Plaintiffs' counsel will apply for an award of fees not to exceed 33⅓% of the Settlement Fund plus their costs and expenses, all to be paid out of the Settlement Fund. If the Court approves Plaintiffs' counsel's application for an award of fees, Authorized Claimants are expected to receive not more than ___% of their Recognized Loss, reduced by the expenses of Plaintiffs' counsel, the Settlement Administrator and the costs of administration, taxes and other expenses as provided in the Stipulation. Defendants will not object to Plaintiffs' counsel's application for the Fee and Expense Award. No adjustment shall be made to the Class Members' Settlement Amounts by reason of the failure of other Settlement Class Members to comply with the procedures set forth herein.

30. Upon the Effective Date and thereafter, and in accordance with the terms of the Stipulation and the Plan of Allocation, the Net Settlement Fund shall be distributed to Authorized Claimants, subject to and in accordance with the provisions of this notice and the Stipulation of Settlement.

31. Payment shall be deemed conclusive as to all Settlement Class Members. All Settlement Class Members who do not timely submit Proofs of Claim and Release shall be barred from participating in distributions from the Net Settlement Fund, but otherwise shall be bound by all of the terms of this Stipulation, and the Final Order and Judgment entered in the Litigation.

V. SETTLEMENT HEARING

32. A Settlement Hearing will be held on _____, 1997, at_____ __.m. in the Courtroom of The Hon. Ursula Ungaro-Benages, United States District Court for the Southern District of Florida, 30 N. Miami Avenue, Room 150; Miami, Florida 33128.

33. At the Settlement Hearing, the Court will consider whether it should finally approve this Settlement and dismiss the Litigation as to the Defendants on the merits and consider an award of fees and expenses to Plaintiff's Settlement Counsel and Plaintiffs' Class Counsel of Record. The Settlement Hearing may be adjourned from time to time by the Court without further notice.

34. At the Settlement Hearing, any Settlement Class Member may appear in person or by counsel and be heard to the extent allowed by the Court in support of, or in opposition to, the fairness, reasonableness, and adequacy of the Settlement or any of the other matters considered by the Court, provided, however, that in no event shall a person be heard in opposition to the Settlement or to the Court's award of counsel fees, and/or reimbursement of expenses, and in no event shall any paper or brief submitted by any such person be accepted or

considered by the Court, unless, on or before _____, 1997, such person (a) files with the Clerk of the Court notice of such person's intention to appear, together with a statement that indicates the basis for such opposition, along with any supporting documentation, and (b) serves copies of any other papers or briefs such person seeks to file with the Court, in person or by mail upon each of the following attorneys:

Plaintiffs' Settlement Counsel	Defendants' Counsel
John L. Cooper, Esq.	Martin I. Kaminsky, Esq.
Farella, Braun & Martel LLP	Pollack & Kaminsky
235 Montgomery Street	114 W. 47th Street
San Francisco, CA 94104	New York, NY 10036

VI. ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

35. Plaintiffs' Settlement Counsel and counsel for Representative Plaintiffs will submit an application for an award of attorneys' fees and reimbursement of expenses and costs, to be paid by the Settlement Administrator from the Settlement Fund as awarded by the Court.

36. Distribution of the proceeds of any settlement or any judgment, including the award of attorneys' fees and expenses and the method of payment, is subject to Court approval.

VII. EXAMINATION OF PAPERS AND INQUIRIES

37. For a more detailed statement of the matters involved in the Litigation, reference is made to the pleadings, to the Stipulation to the Orders entered by the Court, and to the other papers filed in the Litigation, which may be inspected at the Office of the Clerk of the United States District Court for the Southern District of Florida, 301 N. Miami Avenue, Room 150; Miami, Florida 33128, during business hours of any business day.

38. Any inquiries concerning this Notice or the Proof of Claim and Release form by Settlement Class Members should be made by writing to the Settlement Administrator at Garden City Group, Settlement Administrator, Waters and Bartholomew Class Action, P.O. Box XXX, Garden City, NY 11530 or calling the Settlement Administrator at 1-800-XXX-XXXX. Inquiries should not be directed to the Court or the Clerk's Office.

Dated: _____, 1997

_____

CLERK, UNITED STATES DISTRICT COURT

APPENDIX I

Exhibit A-2 to Stipulation of Settlement,
dated January 17, 1997:
[Draft] Summary Notice

Exhibit A-2

NOTICE OF PROPOSED SETTLEMENT OF CLASS ACTION, SETTLEMENT HEARING, AND RIGHT TO APPEAR AT HEARING TO BE HELD ON , 1997

SUMMARY NOTICE

TO: ALL PERSONS WHO OPENED CUSTOMER ACCOUNTS AT MULTIVEST OPTIONS, INC. (OR IPMC OPTIONS, LTD.) AND TRADED EXCHANGE TRADED OPTIONS AT ANY TIME DURING THE PERIOD FROM JUNE 1, 1985 THROUGH OCTOBER 31, 1989.

THE PARTIES HAVE AGREED TO A SETTLEMENT OF THE LITIGATION WHICH PROVIDES FOR BENEFITS TO SETTLEMENTCLASS MEMBERS IF THE SETTLEMENT IS APPROVED BY THE COURT.

YOU ARE HEREBY NOTIFIED, pursuant to Rule 23 of the Federal Rules of Civil Procedure and an Order of the United States District Court for the Southern District of Florida dated _____, 1997, that a hearing will be held on _____, 1997, at ____, before The Honorable Ursula Ungaro-Benages, United States District Court for the Southern District of Florida, 301 N. Miami Avenue, Miami, Florida 33128. The hearing is to determine whether the proposed Settlement of the Litigation against the Defendants should be approved by the Court as fair, reasonable, and adequate; whether Plaintiffs' counsel's applications for an award of fees and expenses, including payments to the named plaintiffs, to be made out of the Settlement Fund should be approved; and whether the

Complaint should be dismissed as to the claims against the Defendants on the merits and with prejudice.

IF YOU OPENED CUSTOMER ACCOUNTS AT MULTIVEST OPTIONS, INC. OR IPMC OPTIONS, LTD. AND TRADED EXCHANGE TRADED OPTIONS DURING THE PERIOD FROM JUNE 1, 1985 THROUGH OCTOBER 31, 1989, YOUR RIGHTS WILL BE AFFECTED AND YOU MAY BE ENTITLED TO MONEY. Authorized Claimants are expected to receive [33-1/3]% of their Recognized Loss, to be reduced by the attorneys' fees, costs and expenses of this Litigation and Settlement. Plaintiffs' counsel has applied for an award of attorneys' fees equal to 33⅓% of the Settlement Fund. If Plaintiffs' counsel's application for a fee is approved by the Court, Authorized Claimants will receive [20]% of their Recognized Loss to be reduced by the costs and expenses of this Litigation and Settlement. If you have not yet received the "Notice of Proposed Settlement of the Class Action, Settlement Hearing, and Right to Appear", which more completely describes the Settlement and your rights thereunder in detail, and a Proof of Claim and Release form, you may obtain copies thereof by identifying yourself as a member of the Settlement Class by writing to:

The Garden City Group
Settlement Administrator
Waters and Bartholomew Class Action
P.O. Box XXXX
Garden City, NY 11530

To participate in the Class Settlement, you must submit a Proof of Claim no later than _____, 1997. IF YOU DO NOT SUBMIT A PROPER PROOF OF CLAIM AND RELEASE FORM, YOU WILL NOT SHARE IN THE SETTLEMENT BUT YOU WILL BE BOUND BY THE FINAL ORDER AND JUDGMENT OF THE COURT UNLESS YOU HAVE PREVIOUSLY TAKEN ACTION TO

EXCLUDE YOURSELF FROM THE SETTLEMENT CLASS.

PLEASE DO NOT CONTACT THE COURT OR THE CLERK'S OFFICE FOR INFORMATION.

APPENDIX J

Excerpts from Denise N. Martin et al., National Economic Research Associates, Recent Trends IV: What Explains Filings & Settlements in Shareholder Class Actions?, (1996)

RECENT TRENDS IV: WHAT EXPLAINS FILINGS AND SETTLEMENTS IN SHAREHOLDER CLASS ACTIONS?

by

Denise N. Martin, Vinita M. Juneja,
Todd S. Foster, Frederick C. Dunbar

November 1996

NATIONAL ECONOMIC
RESEARCH ASSOCIATES

RECENT TRENDS IV: WHAT EXPLAINS FILINGS AND SETTLEMENTS IN SHAREHOLDER CLASS ACTIONS?

by

Denise N. Martin, Vinita M. Juneja,
Todd S. Foster, Frederick C. Dunbar[1]

We have updated and expanded our earlier studies on recent trends in securities class actions. Our data now cover the five full calendar years from January 1991 to December 1995, as well as dispositions reported through June 1996 and filings reported through October 1996. Below, we summarize our key findings.

- A decrease in the number of federal filings was observed in early 1996, but does not appear to signify a general downturn. The most recent data (which include filings reported through October 1996) indicate no significant decline in federal class action filings has occurred since passage of the Private Securities Litigation Reform Act of 1995 ("the Reform Act").
- A significant increase in the number of *state* filings has occurred since passage of the Reform Act.
- The filing rate of cases responds to overall stock market conditions. Significantly more cases are filed in the months following a bearish market than following a bullish one. To date, these market

---

[1] Denise N. Martin is a Senior Consultant, Vinita M. Juneja is a Vice President. Todd S. Foster is an Analyst and Frederick C. Dunbar is a Senior Vice President at National Economic Research Associates, Inc. (NERA), an economic research and consulting firm.

movements have had a more pronounced impact on the filing rate than has the Reform Act.

- From January 1991 through June 1996, 998 shareholder class actions were dismissed, settled or resolved by a jury verdict.

- If the historic 12 percent average annual growth rate continues in 1996, we can expect almost 250 cases to be resolved this year, up from 138 in 1991.

- Over the full sample period, 80 percent of the cases were resolved through settlement. Even cases that were dismissed, reached trial or received a jury verdict often settled before an appeal was resolved.

- Dismissals as a percentage of case dispositions have ranged between 14 and 21 percent over the past five and a half years. In the first half of 1996, 20 percent of dispositions were dismissals, as they were in 1995, up from 16 percent in 1994.

- Approximately $3.9 billion has been paid out in settlement awards from January 1991 through June 1996 for 475 federal, shareholder class action settlements. These cases represent roughly 60 percent of all settlements, suggesting as much as $6.5 billion has been paid out overall. On average, plaintiffs' attorneys have received one-third of the settlement awards in each year.

- Average settlements increased significantly between 1994 and 1995, as did plaintiffs' attorneys' fees. In particular, the average settlement for calendar year 1995 was $10.6 million, up from $6.1 million in 1994. Plaintiffs' attorneys' fees increased proportionately, from $2.0 million in 1994 to $3.5 million in 1995. Average settlements and fees for the first six months of 1996, $7.0 million and $2.3 million, respectively,

suggest the 1995 increase will not be sustained, and may even be reversed.

- The ratio of settlement value to plaintiffs' claimed damages over the sample period was 14 percent. The ratio of settlement value to investor losses was about 9 percent.

- About 25 percent of the settlements were for under $2 million.

- A disproportionately large number of securities class action cases are filed against high-technology firms, accounting for roughly 23 percent of all filings over the past five and a half years. This filing trend has continued in 1996. Curiously, only 15 percent of the cases that *settled* in the first half of this year were against high-technology companies, down from 30 percent over the past five years.

- As in our earlier studies, cases with higher plaintiffs' damage estimates and higher investor losses have higher settlements. However, the increase is less than proportional. As an example, consider two cases that are similar except that one has twice the plaintiffs' damage estimate of the other (e.g., $200 million versus $100 million). Our analysis shows that the expected settlement in the former case is roughly 48 percent higher than in the latter: about $12.3 million versus $8.3 million. This finding is consistent with the theory that settlement values are constrained by a firm's assets and insurance coverage, which are necessarily limited.

- Inclusion of accounting firms as codefendant adds over 70 percent to the expected settlement value of a shareholder class action for the period January 1991 to June 1996. This finding is again consistent with the notion that available assets, especially insurance,

are a major factor in explaining settlement amounts. When we consider 1995 and 1996 settlements alone, this figure jumps to 150 percent. We posit that the increasing effect of these advisor defendants in 1995 may be related to a change after the *Central Bank* decision in how accountants' liability is pled. The proportionate liability clause enacted through the Reform Act may be partially responsible for the decline that we observe in the first half of 1996 in how much the inclusion of an accounting firm as codefendant adds to expected settlement value.

- Settlements that occur within one year of filing are about 25 percent below those that occur later. While this effect can be observed in settlements reached in the most recent 18 months, it has lost statistical significance. We posit that dynamics related to the Reform Act may be responsible.

- For cases settled between January 1995 and June 1996, a governmental agency investigation with an adverse outcome is associated with a statistically higher settlement, suggesting that the merits may be playing an increasing role in case resolution. Although the Reform Act did not govern the resolution of these cases, which were filed prior to its enactment, we suspect that it may be indirectly responsible.

- The presence or absence of accounting firms or underwriters as codefendants, the age of the case and the size of either investor losses or plaintiffs' damage estimate together explain between 52 and 64 percent of the variation in class action settlement values between 1991 and mid-1996.

- For a case in which a company and its officers and directors are named as defendants, an average of 70.0 percent of the settlement amount is paid from

directors' and officers' liability insurance, 29.7 percent by the defendant company and 0.3 percent by the officers and directors personally.

- For a case with a concurrent derivative action, on average approximately 65 percent of the settlement is allocated to the shareholder class action.

APPENDIX K

Table 12b from Denise N. Martin et al., National Economic Research Associates, Recent Trends IV: What Explains Filings & Settlements in Shareholder Class Actions?, (1996)

Table 12b

Plaintiffs' Attorney Fees by Circuit [8,9,10]

Circuit	Number of Settlements	Settlements as a Percentage of Total	Total Value of Settlements	Total Attorney Fees	Average Attorney Fee as a Percentage of Settlement
		(Percent)	(Dollars)		(Percent)
	(1)	(2)	(3)	(4)	(5)
D.C.	2	0.46%	$ 6,750,000	$ 2,200,000	31.67%
First	26	6.00	82,633,902	25,677,884	30.99
Second	69	15.94	440,285,121	139,037,770	31.48
Third	58	13.39	423,292,596	132,738,442	32.00
Fourth	12	2.77	75,325,000	23,716,667	32.78
Fifth	26	6.00	262,720,500	81,420,017	30.73
Sixth	13	3.00	120,875,000	36,921,000	31.00
Seventh	18	4.16	149,933,784	48,375,833	31.83
Eighth	12	2.77	52,175,000	17,640,500	32.47
Ninth	155	35.80	1,379,894,030	450,725,681	32.57
Tenth	13	3.00	203,650,000	62,038,333	32.13
Eleventh	29	6.70	168,352,500	49,998,375	29.92
Total	433	100.00%	$3,365,887,433	$1,070,490,502	31.84%

Tables
Notes and Sources

8) Cases were selected for this study if they met the following criteria:

1. The suit was filed in federal court.
2. The named defendant(s) include a corporation or partnership.
3. The plaintiff alleged fraud involving at least the price of common stock.
4. The case included allegations of material misrepresentations and omissions regarding the true health and potential of the defendant company.

5. The settlement was either in cash or a cash equivalent could be determined.

9) Includes cases for which attorney fees could be distinguished from attorney expenses.

10) Attorney fees are frequently indicated as "up to" or "not to exceed" a particular percentage of the settlement value. For these cases, the maximum attorney fee awardable was used for calculations.

APPENDIX L

Defendants' Motion Pursuant to Fed. R. Civ. P. 52(b) and 59(e), dated April 21, 1997

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

WILLIAM WATERS AND LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated, Plaintiffs, -against- INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, Individually and as Trustee of the Jason Grosfeld Trust, MULTIVEST REAL ESTATE, INC., S. S. MELBOURNE, INC., and THE CYPRESS GROUP, INC., Defendants.	Case No. 90-6863 CIV-UNGARO-BENAGES

DEFENDANTS' MOTION PURSUANT TO FED. R. CIV. P. 52(b) and 59(e)

Defendants move to alter and amend the Court's Final Order and Judgment Approving Settlement dated April 2, 1997 ("Final Order") pursuant to Fed. R. Civ. P. 52(b) and 59(e) and upon the affidavit of Michael R. Siebecker sworn to April 21, 1997, on the grounds that the Court misapprehended the relevant facts in the following particular respects.

(1) During the hearing on March 31, 1997, the Court erroneously assumed that the only evidence which it might consider in determining the amount of attorneys' fees to be

awarded was the study of National Economic Research Associates ("NERA") captioned Recent Trends IV: What Explains Filings and Settlements on Shareholder Class Actions? ("NERA Study") filed by plaintiffs. The Court also had before it the evidence summarized in Exhibit A to Defendants' Supplemental Response to Plaintiffs' Counsel's Request for Fees and Expenses, submitted prior to 3:00 p.m. on March 28, 1997 as required by the Court's Order of March 27, 1997. The information contained in that Exhibit, as more fully described and updated in the affidavit of Michael R. Siebecker, Esq., sworn to on April 21, 1997 ("Siebecker Aff.") submitted herewith established that:

(a) the ratio of the amounts actually distributed to class members to the investment loss in 14 recent securities cases was in the range of .4% to 14% with the ratio in 8 of the 14 cases falling in the 2%-6% range (Siebecker Aff. ¶ 11);

(b) the ratio of attorneys' fees and expenses to the amounts actually distributed in those 17 securities cases was in the range of 22% to 98% (Siebecker Aff. ¶ 11);

(c) the ratio of the projected actual distribution to the investment loss in this litigation is 5% (Siebecker Aff. ¶ 11); and

(d) the ratio of attorneys' fees and expenses projected actual distribution in this litigation is 266% (Siebecker Aff. ¶ 11).

(2) During the hearing of March 31, 1997, the Court misinterpreted the NERA Study. The Court's principal justification for awarding an attorney's fee of 33-1/3% of the nominal settlement fund of $40,000,000 in this litigation was the conclusion reported in the NERA Study that attorneys' fees in recently settled cases in the Eleventh Circuit averaged 29.92% of the settlement funds in those cases. In relying on

that conclusion, the Court erroneously assumed that courts in the Eleventh Circuit are awarding approximately 30% of the nominal settlement funds as attorneys' fees in securities class action settlements, regardless of the amount of the actual distributions to the class. The Court proceeded on the assumption that the 29.92% average reported by NERA was comparable to the 33-1/3% requested by plaintiffs' counsel in this litigation. The court concluded that the 33-1/3% requested by plaintiffs' counsel as attorneys' fees reflected a modest upward adjustment of the typical experience in the Eleventh Circuit.

In fact, the NERA Study reported the relationship between attorneys' fees and the actual amounts recovered by settlement class members, not the amounts of the nominal settlement funds. As described in the Siebecker affidavit, NERA studied 29 cases in the Eleventh Circuit in arriving at its conclusions. In each of these 29 cases, NERA measured the relationship between the attorneys' fees awarded and the actual amounts distributed to the class.

The average of fees awarded to the amounts actually distributed in those 29 cases was 42.9% (Siebecker Aff. ¶ 15). In no case was the fee awarded in excess of 50% of the amount actually distributed to the class. In this litigation, the fee awarded constitutes 222% of the projected actual distribution to the class.[1]

While defendants take no position as to any appropriate exercise of the Court's discretion, any exercise of the discretion

---

[1] Defendant's Settlement Fund Distribution Analysis (Siebecker Aff., Ex. A) measures fees and expenses as a percentage of the amounts actually distributed to the class. The NERA Study measures fees only as a percentage of the sum of attorneys fees, all expenses and actual distributions to the class.

must be grounded in the applicable rules of law and by reference to comparable relevant facts.

Respectfully submitted,

By: /s/ Paul M. Dodyk

CRAVATH, SWAINE & MOORE
Paul M. Dodyk
Matthew S. Schweber
Michael R. Siebecker
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

POLLACK & KAMINSKY
Martin I. Kaminsky
Edward T. McDermott
Justin Y.K. Chu
114 West 47th Street
New York, NY 10003
(212) 575-4700

HOMER & BONNER
R. Lawrence Bonner
Marc A. Wites
100 S.E. Second Street
Miami, Florida 33131
(305) 256-7800

Attorneys for Defendants

April 21, 1997

APPENDIX M

Affidavit of Michael R. Siebecker,
executed April 21, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

WILLIAM WATERS AND LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated, Plaintiffs, -against- INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., et al., Defendants.	Case No. 90-6863 Civ-UNGARO-BENAGES AFFIDAVIT OF MICHAEL R. SIEBECKER

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MICHAEL R. SIEBECKER, being duly sworn, deposes and says:

1. I am associated with Cravath, Swaine & Moore in New York City where I have worked since 1994. I submit this affidavit in support of defendants' motion for reconsideration.

2. Below I : (a) report the number of class members who have submitted proofs of claim to date in this litigation and project probable distributions to the class under the Court's orders; (b) set forth the sources and methods for calculation used to create defendants' Settlement Fund Distribution Analysis, attached to Defendants' Supplemental Response To

Plaintiffs' Counsel's Request For Fees And Expenses as Exhibit A, dated March 28, 1997; and (c) explain the nature of certain settlement allocations and fee awards in cases described by National Economic Research Associates ("NERA") at Table 12b in Recent Trends IV: What Explains Filings And Settlements In Shareholder Class Actions? ("NERA Study") and referred to by plaintiffs in their Application For Final Approval Of Class Action Settlement, Plan Of Allocation And Class Counsel's Request For Award Of Fees And Costs, dated February 20, 1997, upon which the Court relied in adopting a "29.92% benchmark" during the hearing of March 31, 1997.

Probable Distribution In This Litigation

3. As of April 21, 1997, the Settlement Administrator had received about 4,500 proofs of claim. The Settlement Administrator initially mailed somewhat over 20,000 claim packets and later re-mailed approximately 7,500 claim packets. Based on the foregoing data, it is estimated that the number of authorized claimants will approximate 25% of the settlement class members. It is further estimated that the submission of those claims will result in a distribution of about $6,000,000.

Settlement Fund Distribution Analysis

4. I am fully familiar with the sources of information and calculations used to create the Settlement Fund Distribution Analysis and, based on my personal review of those sources and calculations, I confirm that the figures contained in the Settlement Fund Distribution Analysis, attached to this affidavit as Exhibit A, are true and correct.

5. The sources of information underlying the Settlement Fund Distribution Analysis include (a) accounting records of litigation fees actually disbursed, (b) accounting records of funds actually distributed to claimants, (c) publicly available SEC filings, (d) stock price quotes from Investment Dealers' Digest Information Services, Tradeline, (e) litigation files, and

(f) communications with record counsel for particular litigations.

6. The figures for "Attorneys' Fees and Expenses" were calculated by the summation of entries reflecting the payment of attorneys' fees in accounting records detailing amounts actually paid from settlement funds. With respect to the Windmere and Ambase litigations, figures for attorneys' fees were taken from amounts reflected in litigation files and confirmed by record counsel.

7. The figures for "Amount Distributed To Class" represent the summation of actual disbursements to claimants as reflected in accounting records detailing amounts paid from settlement funds. With respect to the Windmere and Ambase litigations, figures for actual disbursements were taken from amounts reflected in litigation files and confirmed by record counsel.

8. The percentages listed under "Ratio Of Fees To Class Distribution" were derived for each case by dividing the figure under "Attorneys' Fees and Expenses" by the figure listed under "Amount Distributed To Class".

9. The figures for "Investment Loss" were derived by multiplying (a) the difference between the closing stock price on the first date of the class period and the closing stock price on the last date of the class period (as reflected by IDD Information Services, Tradeline) by (b) the number of outstanding shares of stock in the issuing company (as reflected in publicly available SEC filings).

10. The percentages listed under "Ratio Of Class Distribution To Investment Loss" were derived in each case by dividing the figure listed under "Amount Distributed To Class" by the figure listed under "Investment Loss".

11. As set forth in Exhibit A, the ratio of the Class Distribution to the Investment Loss experienced by the class varies between .4% and 14% with 8 of the 14 cases clustered in

the range of 2% to 6%, while the ratio in the Multivest litigation is 5%. The ratio of Attorneys' Fees and Expenses to the Class Distribution varies between 28% and 98%, while the ratio in the Multivest litigation is 266%.

NERA Study

12. During the course of its March 31, 1997 ruling, the Court relied on a conclusion set forth in a study by National Economic Research Associates ("NERA") entitled Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions? to the effect that attorneys' fees constituted 29.92% of the total settlement funds of certain securities cases settled in the Eleventh Circuit. I have obtained a listing of the 29 cases relied upon by NERA in reaching that conclusion. These cases are listed in Exhibit C, together with the settlement funds and attorneys' fees paid in each of those cases. As summarized below, the settlement funds in each of those 29 cases represent funds actually paid in fees and expenses or actually distributed to class members, not a nominal settlement fund in a case with a substantial reversion, such as the Multivest litigation. Accordingly, in no case surveyed by NERA in the Eleventh Circuit did the fees paid exceed 50% of the amount actually distributed to the class whereas plaintiffs' counsel in the Multivest litigation seek a fee award which constitutes 222% of the projected actual distribution to the class.[2]/

13. With respect to the 29 cases used to calculate the 29.92% "average attorneys' fee as a percentage of settlement" in the Eleventh Circuit as reported in Table 12b of the NERA

---

[2] The percentages calculated in Exhibit A represent the ratio of attorney's fees and expenses to amounts actually distributed to class members; the percentages calculated in Exhibit C represent the ratio of attorneys' fees to the sum of attorneys' fees, all expenses and amounts actually distributed to class members. Thus, the Ratio Of Fees To Class Distribution for the Multivest litigation as reported in Exhibit A is 266%; the ratio of attorneys' fees to the settlement fund as a whole equals 222%.

Study (attached as Exhibit B) and as cited by the Court, I have reviewed (a) a list of the 29 Eleventh Circuit cases provided by NERA which it used in creating Table 12b, (b) summaries of settlement agreements published in Securities Class Action Alert and (c) reports of communications with record counsel in various litigations.

14. Based on my personal review of those materials, I confirm that:

(a) The stipulations of settlement in 16 of the 29 cases reflected in Table 12b of the NERA study provided for pro rata distribution of all funds in the settlement fund after payment of fees and expenses, meaning that all amounts in the settlement fund were distributed in the form of fees, expenses or distributions to the class in each of these 16 cases: Home Shopping Network, Inc. I, 87-428-CIV-T-13(A) (M.D.Fla. 1991); Home Shopping Network Inc. II, 87-428-CIV-T-13(A) (M.D.Fla. 1991); FPL Group Inc., 90-8641-CIV--Nesbitt (S.D.Fla. 1991); Digital Communications Associates Inc., 1:89-CV-2195-RCF (N.D.Ga. 1992); Silk Greenhouse Inc., 89-1612-CIV-T-15A, 90-135-CIV-T-15A (M.D.Fla. 1992); Nutmeg Industries, Inc., 90-406-CIV-T-21A (M.D.Fla. 1992); Comptronix Corporation, CV-92-PT--2752-M (N.D.Ala. 1993); National Data Corporation, 1:90-CV-1037A-JEC (N.D.Ga. 1993); Southeast Banking Corp., 90-0760-CIV-MOORE (S.D.Fla.); Scientific-Atlantic, Inc., 1:88-CV-2208-RLV (N.D.Fla. 1994); Knowledgeware, Inc., 1:92-CV-1651-JTC (N.D.Ga. 1994); International Recovery Corp., 92-1474-CIV-ATKINS (S.D.Fla. 1994); Quadrex Corporation, 93-CIV-10190-MMP (N.D.Fla. 1994); Koger Equity, Inc., 90-917-CIV-J-10 (M.D.Fla. 1994); Dycom Industries, Inc., 91-8395-CIV-Graham (S.D.Fla. 1994); Pages, Inc., 95-277-CIV-T-21-C (M.D.Fla. 1994).

(b) The stipulations of settlement in the remaining 13 cases reflected in Table 12b of the NERA study provided

for a reversion to defendants under certain conditions. However, these conditions were not satisfied in any of these 13 cases. As a result, all amounts in the settlement fund were distributed in the form of fees, expenses or distributions to the class in each of these cases: DBA Systems, Inc., 89-032-CIV-ORL-19 (M.D.Fla. 1991); Jan Bell Marketing, Inc., Civil No. 90-6183 (S.D.Fla. 1992); Perfumania, Inc., 92-1490-CIV-Marcus (S.D.Fla. 1993); Aero Systems, Inc., 90-0083-CIV-Paine (S.D.Fla. 1993); Belmac Corp., 92-1814-CIV-T-23(C) (M.D.Fla. 1994); Sound Advice, Inc., 92-6457-CIV (S.D.Fla. 1994); C&S/Sovran Corporation, 1:90-CV-1354-JED (N.D.Fla. 1994); Home Shopping Network, Inc., 93-602-CIV-T-25(B) (M.D.Fla. 1994); General Development Corporation, CIV-90-0691 (S.D.Fla. 1994); C&S/Sovran Corporation, 92-8368-CV-Highsmith (S.D.Fla. 1994); Sheffield Industries, Inc., 93-1-60-Ferguson (S.D.Fla. 1994); Peoples Telephone Company, Inc., CIV-94-0976 (S.D.Fla. 1994); Telematics International, Inc., 89-6015-CIV-Paine (S.D.Fla. 1994).

15. As a result, the ratio of 29.92% relied upon by the Court constitutes a ratio of the attorneys' fees paid to the sum of the actual amounts distributed to the class and the attorneys' fees and expenses in the 29 cases studied by NERA. Stated as a percentage of the amounts actually distributed to the class, the attorneys' fees in those 29 cases averaged 42.9% and did not exceed 50%. In the Multivest litigation, the fees awarded constitute 222% of the projected amount which will actually be distributed to the class.

/s/Michael R. Siebecker
Michael R. Siebecker

Sworn to before me this 21st
day of April 1997.

[EXHIBIT A]

WILLIAM WATERS and LINDA BARTHOLOMEW, Plaintiff,

against

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., et al., Defendants

SETTLEMENT FUND DISTRIBUTION ANALYSIS

LITIGATION[1]	ATTORNEYS' FEES AND EXPENSES[2]	AMOUNT DISTRIBUTED TO CLASS[3]	RATIO OF FEES TO CLASS DISTRIBUTION	INVESTMENT LOSS[4]	RATIO OF CLASS DISTRIBUTION TO INVESTMENT LOSS
MultiVest Litigation	15,997,237	6,000,000[5]	266%	119,900,000	5%
Temeco Securities Litigation	12,514,590	37,584,834	33%	4,393,054,155	.9%
T2 Medical Shareholder Litigation	8,505,110	17,748,705	48%	460,535,898	4%
Zenith Securities Litigation	4,584,037	4,666,345	98%	178,688,107	3%
General Development Corporation Securities Litigation	4,071,762	6,179,685	66%	128,966,355	5%
Foodmaker/Jack-In-The Box Securities Litigation	3,990,816	8,448,506	47%	63,450,000	13%
Dell Securities Litigation	3,649,683	10,310,509	35%		
Maxicare Securities Litigation	3,603,830	4,965,879	73%		
Regina Securities Litigation	3,038,947	4,377,966	69%	30,641,416	14%
Dun & Bradstreet Securities Litigation	2,492,031	11,508,567	22%	855,146,328	1%
Avon Securities Litigation	2,141,664	4,280,460	50%	67,348,094	6%
Cray Computer Securities Litigation	1,950,233	2,974,909	66%	32,119,843	9%
Windmere Securities Litigation	1,837,500	7,350,000	25%	262,890,161	3%
AES Securities Litigation	1,610,733	2,856,718	56%	139,462,755	2%

LITIGATION[1]	ATTORNEYS' FEES AND EXPENSES[2]	AMOUNT DISTRIBUTED TO CLASS[3]	RATIO OF FEES TO CLASS DISTRIBUTION	INVESTMENT LOSS[4]	RATIO OF CLASS DISTRIBUTION TO INVESTMENT LOSS
Crossland Savings, FSB Securities Litigation	1,475,000	4,085,007	36%		
Bank of Boston Securities Litigation	1,305,588	2,557,979	51%	606,152,176	.4%
Eljer Securities Litigation	1,023,544	2,167,748	47%	63,552,960	3%
AmBase Securities Litigation[6]	3,625,879	13,402,948	27%	370,778,492	4%

1. The following constitute the complete names and full docket numbers for the foregoing cases:

   a. In re Tenneco Inc. Securities Litigation, S.D. Tex., Houston div.; II 91-2010;

   b. In re T2 Medical Inc. Shareholder Litigation, N.D. Ga. Atlanta division, 1:94-CV-744-RI.V;

   c. In re Zenith Laboratories Securities Litigation, D. NJ, 86-3241A (DRD);

   d. Tapken, et al. v. David F. Brown, et al., S.D. Fla. Miami division, 90-0691 (Marcus, J.) (General Development Corp.);

   e. In re Foodmaker/Jack-In-The-Box Securities Litigation, W.D. Wash., Seattle; C93-517WD;

   f. In re Dell Computer Corp. Securities Litigation, W.D. Tex., Austin div. 93-CA-282-SS;

   g. Murray Zucker, et al. v. Fred Wasserman, et al., C.D. Cal., Western Division, 88-02499LEW (TX) (Maxicare Securities);

   h. In re Regina Company, Inc. Securities Litigation, D.N.J., 88-4149 (NHP);

   i. Trief, et al., v. The Dun & Bradstreet Corporation, et al., S.D.N.Y., 89-civ 1741 (DNE);

j. In Re Avon Products Inc. Securities Litigation, S.D.N.Y., 89 Civ 6216;

k. Anthony Sterling, et al. v. Cray Computer Corp., et al., D. Col., 91-N2261;

l. In re AES Corporation Securities Litigation, S.D.N.Y., 92 Civ. 4640;

m. In re Crossland Savings, FSB Securities Litigation, F.D.N.Y., 89 Civ. 3645;

n. In re Bank of Boston Corp. Securities Litigation, D. Mass. 89-2269 II;

o. In re Eljer Industries, Inc. Securities Litigation, N.D. Tex., Dallas, CA3-91 1273 G;

p. In re Ambase Corporation Securities Litigation, S.D.N.Y., 90-Civ-2011-(CSII).

2. The 'ATTORNEYS' FEES AND EXPENSES' represent the fees and expenses awarded to plaintiffs' counsel and, in some cases, may include incentive awards.

3. The 'AMOUNT DISTRIBUTED TO CLASS' consists of the actual consideration ultimately distributed to the class members.

4. The 'INVESTMENT LOSS' is the difference between the price of the defendant's securities at the beginning of the class period and the price of the securities at the close of the class period multiplied by the number of shares outstanding. In cases where the loss involves something more than a readily calculable decline in a security's value, no estimate of INVESTMENT LOSS has been calculated.

5. Projected on the basis of proofs of claims currently submitted to the Settlement Administrator.

6. The figures for this case relate only to the common stock claimants. Therefore, the AMOUNT DISTRIBUTED TO

CLASS represents the 85% of the total settlement fund allocated to the common stock claimants (plus interest as the minimal Treasury Bill rate from 1/1/96 through 3/31/97, minus 48% of defendants' $958,000 maximum reversionary interest allocated to the common stock claimants); ATTORNEYS' FEES AND EXPENSES represent 85% of the total fees and expenses awarded; and INVESTMENT LOSS represents the loss in market value suffered by the common stockholders of Ambase during the relevant class period.

[Exhibit B]

Table 12b

Plaintiffs' Attorney Fees by Circuit[8,9,10]

Circuit	Number of Settlements	Settlements as a Percentage of Total	Total Value of Settlements	Total Attorney Fees	Average Attorney Fee as a Percentage of Settlement
		(Percent)	(Dollars)		(Percent)
	(1)	(2)	(3)	(4)	(5)
D.C.	2	0.46%	$ 6,750,000	$ 2,200,000	31.67%
First	26	6.00	82,633,902	25,677,884	30.99
Second	69	15.94	440,285,121	139,037,770	31.48
Third	58	13.39	423,292,596	132,738,442	32.00
Fourth	12	2.77	75,325,000	23,716,667	32.78
Fifth	26	6.00	262,720,500	81,120,017	30.73
Sixth	13	3.00	120,875,000	86,921,000	31.00
Seventh	18	4.16	149,933,784	48,375,833	31.83
Eighth	12	2.77	52,175,000	17,640,500	32.47
Ninth	155	35.80	1,379,894,030	450,725,681	32.57
Tenth	13	3.00	203,650,000	62,038,333	32.13
Eleventh	29	6.70	168,352,500	49,998,375	29.92
Total	433	100.00%	$ 3,365,887,433	$ 1,070,490,502	31.84%

[Exhibit C]

ELEVENTH CIRCUIT SETTLEMENTS AND SETTLEMENT ALLOCATION PLANS FOR CASES INCLUDED IN RECENT TRENDS IV. TABLE 12b

SCAA DATE	CASE DEFINITION	VENUE	CASE NUMBER	SETTLEMENT FUND	ATTORNEYS' FEES	RATIO OF ATTORNEYS' FEES TO SETTLEMENT FUND
Jul-91	DBA Systems, Inc.	USDC, M. D. of Florida	89-032 CIV ORL-19	$4,100,000	$ 1,366,667	33.3%
Sep-91	Home Shopping Network, Inc. I	USDC, M. D. of Florida	87-428 CIV-T 13(A)	18,050,000	6,016,667	33.3%
Sep-91	Home Shopping Network, Inc. II	USDC, M. D. of Florida	87-428 CIV-T 13(A)	4,050,000	1,350,000	33.3%
Oct-91	EPL Group, Inc.	USDC, S. D. of Florida	90-8461-Civ Nesbitt	12,500,000	3,125,000	25.00%
Jan-92	Digital Communications Associates, Inc.	USDC, N. D. of Georgia	1:89-CV 2195-RCF	6,250,000	2,083,333	33.33%
Apr-92	Jan Bell Marketing, Inc.	USDC, S. D. of Florida	Civil No. 90-6183	4,200,000[1]	1,100,000	26.19%
Jun-92	Silk Greenhouse, Inc.	USDC, M. D. of Florida	89-1612-CIV-T-15A; 90-135-CIV-T-15A	115,000	28,750	25.00%
Sep-92	Nutmeg Industries, Inc.	USDC, M. D. of Florida	90-406-CIV-T-21A	775,000	232,500	30.00%
Sep-93	Perfumania, Inc.	USDC, S. D. of Florida	92-1490-CIV-Marcus	900,000	270,000	30.00%
Oct-93	Aero Systems, Inc.	USDC, S. D. of Florida	90-0083-CIV-Paine	1,550,000	465,000	30.00%
Oct-93	Comptronix Corporation	USDC, N. D. of Alabama	CV-92-PT-2752-M	29,292,500[2]	7,323,125	25.00%
Nov-93	National Data Corporation	USDC, N. D. of Georgia	1:90-CV-1037A-JEC	6,950,000	2,316,667	33.33%
Nov-93	Southeast Banking Corp.	USDC, S. D. of Georgia	90-0760-CIV-MOORE	5,000,000	1,250,000	25.00%
Feb-94	Scientific-Atlanta, Inc.	USDC, N. D. of Florida	1:88-CV-2208-RLV	14,000,000	4,666,667	33.33%
Mar-94	Belmac Corp.	USDC, M. D. of Florida	92-1814 CIV-T-23(C)	2,075,000[3]	691,667	33.33%
Mar-94	Knowledgeware, Inc.	USDC, N. D. of Georgia	1:92-CV 1651 JTC	3,750,000[4]	1,250,000	33.33%
Mar-94	Sound Advice, Inc.	USDC, S. D. of Florida	92-6457-CIV	2,765,000[5]	921,667	33.33%
Apr-94	International Recovery Corp.	USDC, S. D. of Florida	92 1474 CIV-ATKINS	2,600,000[6]	780,000	30.00%

SCAA DATE	CASE DEFINITION	VENUE	CASE NUMBER	SETTLEMENT FUND	ATTORNEYS' FEES	RATIO OF ATTORNEYS' FEES TO SETTLEMENT FUND
May-94	C&S/Sovran Corporation	USDC, N. D. of Georgia	1:91-CV-1354-JEC[7]	9,650,000	2,895,000	30.00%
Sep-94	Quadrex Corporation	USDC, N. D. of Florida	93 10190 MMP	1,400,000[8]	420,000	30.00%
Oct-94	Koger Equity, Inc.	USDC, M. D. of Florida	90-917-CIV-J-10	2,150,000[9]	716,667	33.33%
Nov-94	Dycom Industries, Inc.	USDC, S. D. of Florida	91-8395-CIV-Graham	4,060,000	1,218,000	30.00%
Dec-94	Home Shopping Network, Inc.	USDC, M. D. of Florida	93-602-CIV-T-25(B)	9,600,000	2,880,000	30.00%
Jan-95	General Development Corporation	USDC, S. D. of Florida	CIV-90-0691	10,000,000	3,333,333	33.33%
Mar-95	C&S/Sovran Corporation	USDC, S. D. of Florida	92-8368-CV-Highsmith	750,000	225,000	30.00%
Sep-95	Sheffield Industries, Inc.	USDC, S. D. of Florida	93-1-60-Ferguson	1,172,500[10]	351,750	30.00%
Dec-95	Peoples Telephone Company, Inc.	USDC, S. D. of Florida	CIV-94-0976	3,700,000	1,017,500	27.50%
Jan-96	Pages, Inc.	USDC, M. D. of Florida	95-277-CIV-T-21C	250,000	75,000	30.00%
May-96	Telematics International, Inc.	USDC, S. D. of Florida	89-6015-CIV-Paine	6,750,000[11]	2,227,500	33.33%
	Average			$ 5,807,069	$ 1,744,740	30.46%
	Average, S. D. of Florida			$ 4,303,654	$ 1,252,673	29.49%

Source: Securities Class Action Alert (SCAA).

[1] Includes $3,100,000 value of warrants. Attorney fees to cosist of cash portion of settlement fund.

[2] Includes value of convertible preferred stock and added debenture value.

[3] Includes $1,000,000 value of common stock.

[4] Originally included unvalued warrants; Per 1/96 'SCAA, warrants replaced with $2,000,000 cash component.

[5] Includes $975,000 value of warrants.

[6] Includes $1,300,000 value of common stock or cash.

[7] Case defined by SCAA as Citizens & Southern Corp., Sovran Financial Corporation, C&S/Sovran Corporation.

[8] Includes $700,000 value of common stock.

[9] Includes $1,350,000 average value of warrants (value given as $1,200,000 to $1,500,000).

[10] Settlement fund includes "25% of the profit" from sale of CEO's House." However, that "property is now in foreclosure, and the likelihood of any recovery from its sale is remote." NERA assumes this asset has no value.

[11] Completion of partial settlement reported in 9/94 SCAA.

APPENDIX N

Declaration of Martin Kaminsky,
executed April 24, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

WILLIAM WATERS, et ano, Plaintiffs, -against- INTERNATIONAL PRECIOUS METALS CORPORATION, et al., Defendants.	Civil Action No. 90-6863-CIV Ungaro-Benages/Brown

State of New York)
) ss:
County of New York)

MARTIN I. KAMINSKY, being duly sworn deposes and says:

During the course of my involvement in this action, I had settlement discussions on several occasions with plaintiffs' counsel, Neil A. Goteiner. Most of those discussions were considered, by agreement of counsel, "off-the-record". However, I believe that the information provided in this affidavit does not violate that understanding between plaintiffs' counsel, Neil Goteiner, and me in that regard.

Our settlement discussions began at the time of the mediation in this action, in early 1994, shortly after my firm appeared as counsel for defendant James Grosfeld. They continued until the outset of the trial, at which point settlement negotiations were conducted between Cravath, Swaine & Moore, acting for defendants, and other persons in

Mr. Goteiner's law firm, principally (it is my understanding) John Cooper.

Prior to the trial, the only settlement proposal which plaintiffs' counsel ever made to me was that plaintiffs would accept $90 million in cash payable, immediately after an agreement of settlement was reached. On several occasions, I attempted to get Mr. Goteiner to lower that number or show a willingness to agree to a settlement substantially less than the $90 million and payable in a different manner. He declined to do so. Our settlement discussions broke down at various times, and terminated several months before the trial. Plaintiffs remained unwilling to entertain the possibility of a settlement for significantly less than their $90 million cash demand: defendants were not willing to offer a settlement in that range, much less immediately payable all in cash. Mr. Gotneier and I agreed, however, that if either of us thought it might be useful to resume settlement negotiations at any future time, regardless of whether that side still adhered to its previously stated settlement number and position, we would contact each other to attempt again to explore that possibility.

Just prior to the commencement of the trial, while the parties were engaged in the pre-trial proceedings before the Court in September 1996, Mr. Goteiner called me to explore the possibility of renewed settlement negotiations. Mr. Goteiner reiterated plaintiffs' insistence that any settlement involve a payment of approximately $90 million and be paid all in cash, although (for the first time) he indicated a willingness to discuss other numbers, provided that they were close to the $90 million number. I explained to Mr. Goteiner, at that time, that defendants were still not willing to make settlement in that range or on the terms plaintiffs were demanding, but suggested that the parties nevertheless discuss the possibility of settlement in view of the large amount at stake and the length and expense anticipated for the trial. At first, plaintiffs insisted on receiving a large cash offer from defendants before engaging in any such settlement negotiations. However, at defendants' request, they

relented and agreed to engage in settlement discussions, provided that defendants understood that plaintiffs were still looking for something very close to the same very large immediate cash payment Mr. Goteiner had always mentioned in the past. At defendants' request, plaintiffs designated other representatives of their firm (besides Mr. Goteiner) to conduct settlement negotiations with Paul M. Dodyk of Cravath, Swaine & Moore, who (I told Mr. Goteiner) defendants were designating as their settlement counsel.

From that point on, the settlement discussions were conducted by Mr. Dodyk with other persons at the Farella Braum law firm. Although I was kept advised of the status of those discussions, and asked for and gave input as to certain aspects of the proposed agreement and terms of settlement, I had no further direct conversations with plaintiffs' counsel regarding the terms of settlement until after the settlement agreement has been reached.

/s/ Martin I. Kaminsky
Martin I. Kaminsky

Sworn to before me
this [24th] day of
April, 1997.

APPENDIX O

Declaration of Paul M. Dodyk,
executed April 24, 1997

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

WILLIAM WATERS AND LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated, Plaintiffs, -against- INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, Individually and as Trustee of the Jason Grosfeld Trust, MULTIVEST REAL ESTATE, INC., S. S. MELBOURNE, INC., and THE CYPRESS, GROUP, INC., Defendant.	Case No. 90-6863 CIV-UNGARO-BENAGES DECLARATION OF PAUL M. DODYK

PAUL M. DODYK declares as follows:

1. I submit this declaration in response to Plaintiffs' Memorandum in Support of Motion to Amend Court's Order To Award Additional Costs and Plaintiffs' Response to Defendants' Rule 59 Motion to Alter and Amend the Court's April 2, 1997 Order and Request for Sanctions.

2. This declaration is necessitated by plaintiffs' attempt to divert the Court from the issues legally dispositive of their fee and expense application through false and scurrilous allegations of an alleged breach of the Stipulation of Settlement and their transparent attempts to prejudice the Court's decision by their continued harping on the reversion to Mr. Grosfeld.

3. The most important 'fact relevant to this Court's decision of plaintiffs' counsel's fee application presented by defendants' Rule 59 motion is the fact that no court in the Eleventh Circuit has ever awarded a fee in excess of 50% of the amount distributed to the class whereas plaintiffs' counsel has demanded a fee equal to 222% of the projected distribution. (Siebecker Aff. ¶¶ 12, 15.)

4. The most important facts relevant to plaintiffs' expense application are the facts that, after having submitted two plainly deficient expense submissions which have already been rejected by the Court, plaintiffs' counsel has submitted a third application which still fails to satisfy the most rudimentary requirements of expense applications by failing to provide invoices or evidence of payment for large portions of the expenses, failing to provide any particularized description of the purposes for which any expenses were allegedly incurred, seeking reimbursement for plainly nonreimbursable expenses such as "profit" on duplicating and secretarial and other overhead expenses, and attempting a virtually unprecedented award of interest expense by an untimely and procedurally inappropriate request, all as detailed in defendants' memorandum submitted herewith.

5. Plaintiffs' counsel has chosen not to address the substance of these dispositive issues, but to seek a decision from this Court as the basis of false accusations of misconduct and blatant attempts to prejudice the Court. Defendants are accordingly constrained to reply, notwithstanding plaintiffs' attempts at intimidation by threat of seeking immediate

payment of their counsel fees by an unlawful rewriting of the Stipulation through the pretense of default.

6. I set forth below the following matters: (a) Defendants' Rule 59 motion was timely filed; (b) plaintiffs' counsel has repeatedly breached the Settlement Stipulation since inception; (c) defendants have not breached the Stipulation of Settlement; and (d) plaintiffs' current attempt to defend their unprecedented fee application, not on the basis of the result in this case, which the Court has recognized as unremarkable, but on the basis of their arduous efforts, ignores the fact that this case could have been settled for $6,000,000 plus reasonable attorneys fees years ago, but for plaintiffs' insistence up until the evening of January 26, 1997, that no amount less than $90,000,000 in cash would satisfy their demands, all as detailed in the affidavit of Mr. Kaminsky submitted herewith.

Defendants' Rule 59 Motion was Timely Filed

7. Defendants' Rule 59 motion was timely filed. Both Rules 52 and 59 provide that motions should be made within ten business days after "the entry of the judgment". (F.R. Civ. P. 59(e), 52(b), 6(a)) The cases establish that entry means entry by the clerk on the docket. Jones v. Gann, 703 F.2d 513 (11th Cir. 1983); Yaretsky v. Blum, 592 F.2d 65 (2d Cir. 1979). The Court's judgment was entered on April 8, 1997 (Exhibit A) Defendants' Rule 59 Motion was filed on April 22, the tenth business day after entry. Plaintiffs' argument that the motion was not timely filed is groundless.

Plaintiffs' Breaches of the Stipulation

8. Plaintiffs have breached the Stipulation from inception. During the very first week, plaintiffs' counsel Jeffrey Newman repudiated the agreement reached between the undersigned and Mr. John Cooper that the interest rate on the notes would be at the rate charged by the National Bank of Detroit on their retail certificates of deposit in the amounts of

the claims likely to be filed in this case. Notwithstanding that agreement, Mr. Newman caused Mr. Cooper to apply to the Court for a ruling that would have resulted in a higher rate of return. It was only upon the Court's inquiry into the underlying facts of the negotiation and subsequent ruling that plaintiffs' counsel abandoned their efforts to unilaterally alter the agreement of the parties.

9. During the week of January 31, 1997, counsel for the parties agreed that personal liability for any default during the period prior to the issuance of the letter of credit would be limited to Mr. Grosfeld's assets. Notwithstanding that agreement, in a telephonic conference with the Court, Mr. Newman sought to extend that obligation to include Mrs. Grosfeld's assets and abandoned that attempt only upon perceiving the Court's disinclination to support his unilateral attempt to revise the parties' prior agreement.

10. As soon as counsel returned to New York, they were confronted with a breach of 6.1 of the Stipulation which obligated counsel not to communicate with class members directly or indirectly through the initiation of the publication of matters relating to the case. Attached as Exhibit B to this declaration is an Associated Press release containing Mr. Goteiner's trumpeting of this case " . . . this is by far the largest recovery that commodities customers have achieved . . ." It was only through defendants' immediate threat of recourse to the Court that Mr. Goteiner was restrained from seeking further publicity.

11. Shortly after the initial mailing of the notices to the Class Members, the Settlement Administrator called me to report that he had been subjected to a series of harassing telephone calls from Mr. Newman asking him to change his customary practices in a variety of ways despite §3.1 of the Stipulation which provides that: "The Settlement Administrator . . . shall use reasonable due diligence, utilizing customary procedures . . . ." Among other things,

Mr. Newman insisted that Mr. Buchband change his customary engagement letter in a number of ways. One of the changes Mr. Newman insisted upon was that Mr. Buchband eliminate from the engagement letter his estimate that only 7,000 to 10,000 of the class members would respond to the notice prior to the submission of the engagement letter to the Court. Fearing that plaintiffs' counsel intended to conceal the expected claim ratio from the Court, I filed the engagement letter on March 7, 1997. (Exhibit C)

12. The Court will recall that the parties' discussions concerning the Settlement Administrator resulted in one change to the Garden City Group's customary procedures and that was the use of certain ancillary mailing procedures. The Court will further recall that that modification was agreed to by defendants and did not require a Court Order.

13. After defendants' filing of the Garden City Group's engagement letter, plaintiffs' counsel lost interest in the revision of that letter, which the Court will recall was finally effected after a telephone call from the Court on March 31, 1997. The revised engagement letter contained no significant substantive changes to Garden City Group's customary methods of operation.

14. When plaintiffs, counsel filed their initial fee application on February 20, 1997, defendants were astonished to find that plaintiffs' counsel had submitted a one-page summary to support their request for over two and a half million dollars in expenses and purported to justify their fee in this case by comparing their request for "33-1/3%" of the nominal settlement fund to the results of certain securities cases studied by NERA. Based on my experience with other settlements, it was immediately apparent that plaintiffs' counsel's fee application did not begin to comply with the requirements for applications filed in cases such as this, a judgment which was later confirmed by this Court's order

requiring resubmission and the nature of plaintiffs' counsel's subsequent submissions.

15. When plaintiffs' counsel submitted their fee application, defendants were also confronted with plaintiff's counsel's submission of a radically altered form of final order and judgment by which plaintiffs' counsel sought to unilaterally alter the Stipulation of Settlement. Their proposed revisions included attempts to make counsel's deferred obligations payable upon prepayment of any note held by a class member, to keep the defendants' letter of credit outstanding at its original amount, irrespective of the value of the notes issued or outstanding from time to time, and to improve the assignability provisions of counsel's deferred obligations.

16. As defendants' counsel pointed out the differences between the stipulation and plaintiffs' proposed Final order and the Court indicated its disinclination to countenance such changes, plaintiffs' counsel gradually abandoned their efforts to change the stipulation unilaterally except where they sensed their ability to secure the Court's sanction. Plaintiffs' counsel's attempt to improve their position by court ordered amendment of the Final Order, is in my experience in securities litigation, unprecedented.

17. Based on my experience in securities cases, I knew that the NERA Study relied on by plaintiffs must involve the amounts actually distributed in those cases, not the nominal settlement funds. As a result, I was concerned that the Court would be misled by plaintiffs' counsel's filing and believe that the "33-1/3%" sought by plaintiffs' counsel was comparable to the ratios reported by NERA. My concern was elevated by the fact that plaintiffs' counsel had earlier sought to delete the projected claim information from the Settlement Administrator's engagement letter. Accordingly, I believed it incumbent upon me to disclose my knowledge of the fact that

Federal courts have not, in my experience, awarded counsel fees which exceed the amounts distributed to the Class.

18. Upon reviewing the transcript of the hearing of March 31, 1997, I remained concerned that the Court was proceeding on the assumption that the NERA Study had in fact reported attorney fee ratios on a basis comparable with plaintiffs' award's requests for "33-1/3%".I, therefore, contacted the NERA personnel responsible for the study relied upon and confirmed my belief that the NERA ratios reflected the relationship of attorneys fees to the amounts actually paid out, not the nominal amounts of settlement funds. To insure that the Court was aware of these facts, defendants timely filed their Rule 59 Motion.

Defendants Have Not Breached the Stipulation

19. Throughout their filings, defendants have scrupulously avoided taking any position on how the Court should exercise its discretion in determining plaintiffs' counsel's attorneys fees. Defendants have limited their presentation to advising the Court of material factual misstatements by plaintiffs and citing the Court to relevant legal authority where it was obvious that plaintiffs' submission was out of compliance. There can be no serious question about the fundamental soundness of defendants' principal positions: (1) that NERA reported the relationship of fees to amounts actually distributed to the class, not the nominal amounts of settlement funds; and (2) plaintiffs' expense submission did not approach the standards required by applicable law.

20. The Court is doubtless aware that "clear sailing" agreements of the sort defendants were required to sign in this case are generally disapproved by the courts. Malchman v. Davis, 761 F.2d 893 (2d Cir. 1965); Weinberger v. Great Northern Nekoosa Corp., 975 F.2d 518 (lst Cir. 1991); In Re Wicat Securities Litigation, 671 F.Supp. 726 (D. Utah 1987). One of the principal reasons that clear sailing agreements are generally disapproved by the courts is that they deprive the

court of the adversarial process necessary for considered resolution of issues to be decided.

21. The circumstances of this case demonstrate the reasons why clear sailing agreements are disfavored by the courts. The clear sailing provision in this Stipulation was presented to me by plaintiffs' counsel as a nonnegotiable demand. I had no alternative but to accept it if there was to be any prospect of settlement.

22. Plaintiffs have since used the clear sailing agreement to suppress rational consideration of the fee and expense issues by this Court. They submitted an initial expense request which can only be described as presumptuous in its brevity. They have done their level best to conceal from this Court the projected actual distribution to the class. They have sought to misrepresent their "33-1/3% request as comparable to the NERA Study figures when the NERA Study ratios deal with the relationship of the attorneys fees to the actual amount distributed not nominal settlement funds. They have invoked the spectre of default in an obvious effort to intimidate counsel for defendant from exposing their attempt to procure a fee decision based on misrepresentation of fact, disregard of applicable law, which they dismiss as "anecdotal", false accusations of misconduct and blatant attempts at prejudice.

23. I respectfully submit that the Court should not encourage plaintiffs' counsel's blatant attempt to suppress the rational process of decisionmaking in favor of a one-sided diatribe founded in factual misrepresentation and disregard of law. Given the general judicial disapproval of clear sailing agreements such as that forced upon defendants, they cannot reasonably be construed to prohibit counsel from correcting factual or legal error.

24. Plaintiffs' counsel are obviously attempting to prejudice this Court's dispassionate consideration of the matters before it by their false accusations concerning the conduct and even the "emotional condition" of defense counsel.

Most recently, they have sought to use those accusations to prejudice the Court's approval of their fee and expense application, instead of addressing the truly relevant matters brought to the Court's attention by defense counsel.

Plaintiffs Unreasonable Intransigeance is the only Reason this Case was not Earlier Settled

25. At the present time, plaintiffs' counsel's efforts take the form of justifying their fee application by reference to their many years of arduous efforts rather than the result in the case. The unfortunate truth of the matter is that the arduous efforts of court and counsel are directly attributable to plaintiffs' counsel's intransigeant refusal to negotiate a reasonable settlement of the case at an appropriate time.

26. Plaintiffs' arduous efforts have resulted in a payment to the class of about $6,000,000. Any experienced securities counsel would have readily understood that early in this litigation. The GDC securities litigation in this district which involved a similar investment loss ($128,000,000) and class distribution ($6,179,685) is illustrative (Tapken v. Brown, S.D. Fla., Civ. No. 90-0691 (Marcus)).

27. As Mr. Kaminsky's affidavit makes clear, the only reason this case was not settled years ago was plaintiffs' counsel's adamant insistence on $90,000,000 in cash throughout the period up to the evening of January 26, 1997. For some years, defendants' counsel has been willing to settle this case for amounts similar to the $6,000,000 to be distributed to the class, plus a reasonable attorneys' fee.

28. Plaintiffs' counsel's arduous efforts and imposition on this Court's judicial resources are not the result of any effort rationally related to the outcome of this case. They are directly attributable to the intransigeant and unreasonable settlement behavior of plaintiffs' counsel throughout this litigation.

29. I declare the foregoing to be true under penalties of perjury.

Respectfully submitted,

By: /s/ Paul M. Dodyk

CRAVATH, SWAINE & MOORE
Paul M. Dodyk
Matthew S. Schweber
825 Eighth Avenue
New York, New York 10019
(212) 474-1000

POLLACK & KAMINSKY
Martin I. Kaminsky
Edward T. McDermott
Justin Y. K. Chu
114 West 47 Street
New York, New York 10003
(212) 575-4700

HOMER & BONNER
R. Lawrence Bonner
Marc A. Wites
100 S.E. Second Street
Miami, Florida 33131
(305) 256-7800

Attorneys for Defendants

April 24, 1997

Exhibit A

Details for **Case: 0:90cv06863 Waters, et al v. Int'l Precious Metal, et al**

Date Printed: 4/24/97 11:38:17 AM
Court: Federal District Court -- Southern District of Florida (FtLauderdale)
Judge: Judge Ursula Ungaro-Benages
Filed On: 10/23/90
Note: Dkt # in Northern Dist. CA : is 90-1189 CAL

Docket (last 10 entries)

Sub #	Date	Description
1509	3/27/97	RESPONSE by Earl Washington, Linda Bartholomew, William Waters in opposition to [1508-1] motion to extend time for determination of attorneys' fees and costs (tb) [Entry date 04/04/97]
1510	3/27/97	NOTICE of filing memorandum for the court by The Cypress Group, S.S. Melbourne, Inc., Multivest Estate, James Grosfeld, Multivest, Inc., Int'l Precious Metal (tb) [Entry date 04/04/97]
1511	3/28/97	SUBMISSION of cost backup for $20,000 court reporting invoice by Earl Washington, Linda Bartholomew, William Waters (tb) [Entry date 04/04/97]

1512	3/28/97	MEMORANDUM by The Cypress Group, S.S. Melbourne, Inc., Multivest Estate, James Grosfeld, Multivest, Inc., Int'l Precious Metal in opposition to [1511-1] notice (tb) [Entry date 04/04/97]
1513	3/28/97	SUPPLEMENTAL RESPONSE by The Cypress Group, S.S. Melbourne, Inc., Multivest Estate, James Grosfeld, Multivest, Inc., Int'l Precious Metal to plaintiff's counsel's request for fees and expenses (tb) [Entry date 04/04/97] [Edit date 04/04/97]
1514	3/28/97	NOTICE of filing affidavit of Paul M. Dodyke by The Cypress Group, S.S. Melbourne, Inc., Multivest Estate, James Grosfeld, Multivest, Inc., Int'l Precious Metal (tb) [Entry date 04/04/97]
1515	3/28/97	ORDER regarding defendant's response to plaintiff's applications relating to the settlement (signed by Judge Ursula Ungaro-Benages on 3/25/97) CCAP (tb) [Entry date 04/04/97]
1516	4/2/97	FINAL ORDER and judgment approving settlement (signed by Judge Ursula Ungaro-Benages on 4/2/97) CCAP (tb) [Entry date 04/08/97]

1517	4/4/97	MOTION by Earl Washington, Linda Bartholomew, William Waters plaintiff's class counsel to alter or amend judgment with respect to cost award (tb) [Entry date 04/11/97]
1518	4/4/97	Transcript filed re: fairness hearing Date: 3/31/97 Before Judge: Ungaro-Benages Number of pages: 1-205 (tb) [Entry date 04/11/97]

Exhibit B

© *The Associated Press*

By CATHERINE WILSON

AP Business Writer

MIAMI(AP) -- A shattered commodity futures trading house accused of preying on unsophisticated customers agreed Friday to repay $40 million to about 20,000 clients.

About three-quarters of the trades by Multivest Inc. lost money, but the company enriched itself through a commission-driven strategy pushing more and more trades regardless of market conditions, a civil suit charged.

"As far as we know, this is by far the largest recovery that commodities customers have achieved from an organization like this," said attorney Neil Goteiner, who filed the civil fraud and racketeering suit.

MultiVest of Fort Lauderdale, Fla. denied wrongdoing. Attorneys for the company did not return phone calls seeking comment.

Customers' average loss was $5,000, and the average recovery after attorney's fees and expenses will be about $1,200.

Clients lost a total of $190 million on trades and commissions. In 1988 alone, they lost $52 million while MultiVest collected $30 million in commissions, according to the suit.

The company shut down in 1990 after the federal Commodity Futures Trading Commission blew the whistle. The separate civil suit filed by investors charged the

company operated as a boiler-room fraudulently generating business by phone and mail.

The class-actions suit was settled just before closing arguments in a four-month federal trial, and U.S. District Judge Ursuala Ungaro-Benages signed an order briefly outlining a plan for paying claims.

Most of the settlement money is coming from Detroit multimillionaire James Grosfeld, a homebuilder who controled MultiVest, Goteiner said.

A cash payment of $10 million has been wired to the claims administrator in New York, and the balance is covered by stock presented as security, Goteiner said. He expects funds to be distributed later this year.

MultiVest had up to 350 salesmen at offices in Fort Lauderdale and Boca Raton in Florida and San Diego and Newport Beach in California. The settlement covers clients with accounts from June 1, 1985 to Oct. 31, 1989.

Customers needed to make profits of 485 percent just to break even with the commissions charged by MultiVest, but the trading losses and the commission volume were not disclosed to clients, the lawsuit charged.

Investors came up with internal documents that stressed the need for constant trades; unsophisticated individuals were targeted.

Expenses could not be met by revenues, but MultiVest "nonetheless pushed sales even when inconsistent with market trends," the suit said. The company, it said, "needed not only new accounts but also multiple trades per account in order to be profitable."

Company strategy called for 145 trades per month on each account in 1987, but the rate actually reached 1.82.

The company prepared daily sales reports, and Grosfeld received detailed monthly reports listing commissions, trades per account, customer equity and the relationship between sales and company revenues, the suit said.

AP-NY-01-31-97 1834EST

Copyright 1997 The Associated Press. The information contained in the AP news report may not be published, broadcast, rewritten or otherwise distributed without prior written authority of The Associated Press.

Exhibit C

The Garden City Group, Inc.

Settlement Administration Specialists

January 24, 1997

By Telecopier and Mail

Paul M. Dodyk, Esq.
Cravath, Swain & Moore
825 Eighth Avenue
New York, NY 10019

Re: **Waters & Bartholomew *v.* International Precious Metals, *et al.***

Dear Paul:

Thank you for providing us the opportunity to serve as Settlement Administrator for the settlement of the Waters and Bartholomew v. International Precious Metals Corp., *et al.* Litigation (the "Settlement'' and the "Litigation," respectively, which we understand you are now negotiating.

We wrote you under date of November 26, 1996 to set forth the tasks that we expect to undertake as Settlement Administrator, based on our understanding at that time of the Settlement and the administration requirements. Since that date, we have had a number of discussions with you concerning certain details of the Settlement, and you have made drafts of the Stipulation of Settlement and the Note Administration and Pledge Agreement available to us.

Our Understanding of the Situation

We understand that the defendants in the Litigation have agreed to settle the Litigation by establishing a settlement

fund comprising a combination of cash and promissory notes (the "Fund"), that the Class covered by the Settlement consists of persons or entities who purchased commodities future options from Multivest, Inc. during the period between June 1, 1985 and October 31, 1989 (the "Class Period"), and that the Settlement calls for distribution of the distributable Fund to eligible claimants to be calculated based on their Recognized Losses, defined as the difference between the premiums and commissions that option buyers paid to Multivest and the sum of cash payments received from Multivest and the value of open positions at the end of the Class Period or at when they closed their accounts. We also understand that the defendants expect to retain a reversionary interest in the Settlement Fund.

We also understand that Class members are to complete their Proof of Claim forms and provide documentary support in the form of copies of Multivest monthly account statements. We also understand that the terms of the Settlement will also permit claimants who do not have all their documentation relating to Multivest option transactions to obtain such information from Multivest in the form of copies of customer statements that Multivest has on microfiche, with GCG acting as intermediary in handling such requests, for which Class members are to be charged $50 as an offset to claim amounts to which they may be entitled.

Volume Considerations

You have advised us that the Class comprises about 20,000 Multivest customers, and that it is comprised almost totally of individual speculators rather than professional futures or option traders or entities involved in commodity hedge operations. Based on the discussions we have had, we estimate that it is reasonable to assume that, based in part on the aforementioned assistance that claimants may receive

concerning their transactions, it is reasonable to expect that between 7,000 and 10,000 claims may be filed.

"Hot Line" Services

In the many settlements that we have administered, we have fond that our communication with Class members plays an important role in the success of the settlement and of the claims process. We have pioneered the use of a toll-free "800" number to facilitate this process. Responses to Class member inquiries and assistance in understanding settlements and in completing Proof of Claim forms are provided by trained GCG staff members. It has been our experience that this "hot line" service, which our competitors do not generally offer, has helped Class members to understand and to comply with the requirements of a settlement and of the cognizant court.

Tax Compliance

As you undoubtedly know, the Fund will be subject to Treas. reg. §§ 1.468B- 1 through 1.468B-4. These regulations define entities such as the Fund as qualified settlement funds ("QSFs"). Under these regulations a QSF will be taxed at the maximum trust rate (currently 39.6%) on its modified net income. The regulations allow administration expenses to be deducted from gross income, and allow for the carry-forward of net operating losses, following administrative rules for corporate taxation. QSFs are also required to make quarterly payments of estimated tax. Based on an advisory opinion in a similar case, the Fund will not be a New York state or New York City taxpayer, but other jurisdictions might assert tax nexus.

We will prepare the federal tax returns that the Settlement Fund will have to file as required by the above-cited regulations, as well as the quarterly estimated tax payments. Based on our analysis of the applicable regulations, we do not believe that the Settlement Fund will

be responsible for reporting initial distributions to claimants using Form 1099s. However, we believe that subsequent interest payments on the individual Notes will be reportable.

Settlement Administration Tasks

In administering the claims that will be asserted against the Fund, there are a number of specific tasks that the Claims Administrator will be required to perform. These tasks generally parallel those that have to be performed in the administration of any securities class action settlement. In addition, they will include the providing of information to claimants as described above, and the use of the downloaded database to vet claims received. Based on our experience in administering dozens of such settlements, some of them involving hundreds of thousands of complex claims, we have perfected techniques that use our proprietary Class Litigation And Settlement Support ("CLASS") computer software system to provide strong controls while maximizing cost-effective use of staff.

A key feature of our CLASS system is that all loss calculations are performed by the system rather than manually. Extensive editing and validation steps are performed at data entry time, and also subsequently, to ensure that transaction dates, prices, and quantities are consistent and correct.

The tasks that we expect to address as Settlement Administrator include:

- Design Proof of Claim form: as you know, we have worked at some length with you and Matt Schweber to refine a Proof of Claim form;
- Disseminate notices and Proof of Claim forms (collectively, "Claim Packets"), based on the

downloaded name and address data[3]/, and arranging for published notice;

- Document policies and procedures and train staff in the specifics of the case, using letter texts and phone scripts approved by counsel;
- Process written and telephone inquiries, including requests for transaction information;
- Satisfy requests for Claim Packets;
- Administer opt-outs and excluded claimants;
- Control Proofs of Claim received, evaluate and enter into CLASS system;
- Issue conditional rejection notices ("deficiency letters") and process claimant responses;
- Update claim records;
- Compute awards to claimants;
- Prepare final rejection notices;
- Prepare pre-distribution lists and prepare checks and promissory notes upon receiving Court approval;
- Provide check reconcilement services;
- Research and remail undeliverable distributions, using Freedom of Information Act ("FOIA") search requests to the Postal Service;
- Prepare affidavits;
- Comply with tax reporting requirements; and

---

[3] We plan to have a contractor licensed by the Postal service filter the names and addresses obtained from Multivest through the National Change of Address ("NCOA") database. NCOA maintains a three-year record of all moves announced to the Postal Service.

- Perform the services required of the Settlement Administrator by the Note Administration and Pledge Agreement.

We will customize our CLASS computer system to accommodate the Settlement. The claims processors will enter the transactional data required for the loss calculation and evaluate the claim forms based on the downloaded data and on the supporting documentation, where necessary. They will also note any deficient conditions, and generate the necessary letters to the claimants. Our computer systems staff will write the calculation programs, and our Quality Assurance unit will meticulously test them before they are accepted for claim calculation. This process provides consistency and a very high degree of accuracy of claim calculation.

Proof of Claim Form

We have worked with you and Matthew Schweber, Esq. to develop a draft of a Proof of Claim form that comports with the method of calculating claimant losses.

Functions Relating to the Note Administration Agreement

As Settlement Administrator, we are prepared to act as interim Paying Agent under § 2.02 of the Note Administration and Pledge Agreement, but only to hold the securities tendered by Mr. Grosfeld as collateral pending the Letter of Credit, and to calculate and imprint[4]/ the Individual Notes. We will then provide the Paying Agent with magnetic records to enable him to perform the required functions with

---

[4] We expect that you will provide us with acceptable text for these notes, which we plan to imprint on check-type stock as distinct from engraved certificates from our database, and sign using a signature plate bearing the signature of Mr. Grosfeld or his designee. The process will be subject to the same controls as our check-writing process.

respect to registration, interest distribution and redemption of Individual Notes.

There are certain provisions of the Note Administration and Pledge Agreement dealing with the long-term functions of the Settlement Administrator that we would like to discuss with you.

Quality Assurance

An integral part of the GCG organization is the Quality Assurance Unit, which is charged with user testing of all new or modified computer programs, and is responsible for the integrity of controls applicable to the calculation of settlement fund awards. Accordingly, Quality Assurance conducts extensive testing of the calculation programs to ensure compliance with the terms of each settlement.

The Quality Assurance Unit also conducts final reviews of selected claims before distribution of settlement funds. Throughout the life of each project, Quality Assurance conducts regular random sample tests on the work of each GCG claims processor, as well as programmatic audits of the data base to ensure integrity of the data.

The success of our Quality Assurance Unit's work is evidenced by the fact that out of approximately 2 million claims that we have processed, only 109 claimants have challenged our determination in the courts, and the courts have upheld our determinations in each and every challenge.

Staffing and Scheduling

Our work as Settlement Administrator will be headed by a project manager responsible to Dawn Addazio, Vice President, Project Operations, David Isaac, Esq., Vice President, Legal Services, and I will exercise management oversight over the project. We estimate that under normal circumstances, the claims administration process for the

Settlement could be completed within approximately nine to twelve months from project initiation.

Fees, Billing, and Payment

Our fees for the administration of the Settlement will be based on time actually worked at our standard hourly billing rates, which are presented in Exhibit 1 hereto. In addition to the fee billings, our invoices will also include project expenses. These will include printing, Claim Packet stuffing and mailing charges, publication expense, counsel fees in connection with review and negotiation of the Note Administration and Pledge Agreement, copying charges, postage, telephone company charges, messenger service fees, travel, warehouse service charges, system utilization at standard rates[5]/, and similar expenses. Stuffing and mailing of computer-generated letters and checks performed in-house will be charged at $.25 per piece.

Based on the anticipated volume of 20,000 Class members and 7,000 claims filed, and considering the complexities of the projected administration, we estimate that our fees will be between $150,000 and $200,000, plus expenses which we estimate at about $25,000. These estimates are based on the assumption that the Settlement Fund will be distributed in a single payout cycle within about twelve months of project startup. We will identify separately any tasks outside the scope of those listed above that you may direct us to undertake, such as providing special reports, additional administration efforts, or the preparation of state/local tax advisory opinion requests and state/local returns.

---

[5] $200 per month per workstation assigned to the process reflecting all system hardware utilization.

Conclusion

We recognize the importance of a smooth, efficient, and cost-effective administration, and we will make every effort to provide you with a highly professional and trouble-free operation. If the foregoing is acceptable to you, we would appreciate your returning a signed copy of this letter in confirmation of our engagement. Please don't hesitate to call me, David Isaac or Dawn Addazio if you require additional information on the GCG approach.

Very truly yours,

G. Peter Buchband
President

ACCEPTED:

_____

_____

_____

date

Encl.

Exhibit 1

GCG HOURLY RATES

G. Peter Buchband, President	$ 250
Lois Schnipper, Senior Vice President	225
Andrew S. Sommer, VP, Systems & Technology	225
David A. Isaac, Esq., VP, Legal Services	225
Dawn A. Addazio, VP, Project Operations	175
Charles Ferrara, Director, Quality Assurance	150
Karen Baines, Director, Operations	100
Arun Rao, Controller	175
Richard Weedon, Asst. Controller	85
Systems & programming staff	110-150
Claims evaluators	45-80
Claims processors	35
Quality assurance staff	55-80
Claims control staff	30-45
Project administrators	60

APPENDIX P

Declaration of Martin I. Kaminsky,
(undated, but executed on or about May 8, 1997)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

WILLIAM WATERS AND LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated, Plaintiffs, vs. INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, Individually and as Trustee of the Jason Grosfeld Trust, MULTIVEST REAL ESTATE, INC., ST. MELBOURNE, INC. and THE CYPRESS GROUP INC., Defendants.	CASE NO. 90-68683- CIV-UNGARO-BENAGES DECLARATION OF MARTIN I. KAMINSKY

I, Martin I. Kaminsky, declare as follows:

1. I submit this declaration in response to the declaration of Neil A. Goteiner dated May 5, 1997.

2. Mr. Goteiner has made several inaccurate statements, and has violated both the rule assuring confidentiality of mediations [S.D. Fla. Local Rule 16.2(G)(2)] and our understanding regarding the nature of our various discussions.[6]/

[6] My prior affidavit made no disclosure of the mediation discussions (consistent with the rule) and did not detail our other discussions (consistent with our agreement).

In doing so, he has made several inaccurate statements and attempted to create misleading impressions of the nature of the settlement discussions. I do not believe that it is appropriate to violate the rule that all discussions in mediation are to be confidential or that it will be useful to recite the history of my many discussions with Mr. Goteiner. However, I am constrained to set the record straight in general terms in this further declaration. In view of my effort to preserve the confidentiality of discussions, as agreed by the parties, my silence as to some of the matters stated by Mr. Goteiner should not be regarded as assent thereto or agreement therewith.

3. Mr. Goteiner's statement that all of our discussions were off the record is not accurate. At various times, we agreed that some of the discussions were not off the record. Indeed, Mr. Goteiner has previously contended that some of the discussions were not confidential in papers filed at various points during the course of this or the fraudulent conveyance action, at times improperly transgressing our understanding that what we were talking about was to be confidential.[7]

4. Mr. Goteiner's contention that "defendants made it quite clear that they wanted us to believe they would not make any serious settlement offer until well into the trial" [¶2] is incorrect. Mr. Goteiner has apparently forgotten, or chosen to omit, the fact that I raised the subject of settlement with him on many occasions during the course of my involvement in the case, but was repeatedly and consistently rebuffed with repetitions of his $90 million demand and an insistence that Mr. Grosfeld offer such an unreasonable amount all in cash.

---

[7] Mr. Goteiner's reference to Fed. R. Evid. 408 is inappropriate. That rule renders evidence of settlement discussions "not admissible to prove liability for or invalidity of the claim or its amount", and also provides that "this rule does not require exclusion when the evidence is offered for another purpose..." However, Mr. Goteiner and I did agree that the details of our settlement negotiations would be kept confidential, and I have adhered to that agreement. Unfortunately he has now chosen to state (albeit incorrectly) those details, rather than adhere to our agreement.

5. Mr. Goteiner's contention that, at the mediation and subsequently, "defendants were negotiating in bad faith by lying to plaintiffs about Mr. Grosfeld's assets and by increasing their settlement offer from $3.0 million to only $3.1 million" [¶5(a)] is incorrect. The defendants negotiated in good faith and did not lie about anything at the mediation or in any of the subsequent conversations. This kind of accusation by plaintiffs' counsel is unfortunately characteristic of their ad hominem advocacy throughout this action, which should never have begun.

6. Mr. Goteiner's contentions regarding defendants' offer at mediation are also incorrect. Defendants offered more than $3.1 million at the mediation; and I advised the mediator (in camera) that defendants would pay significantly more than that if plaintiffs would show a willingness to come down to a reasonable number. Plaintiffs refused; and it was they who terminated the mediation. I do not believe it is appropriate for me to include further details about the mediation, except to note that if plaintiffs had shown any realism about their case and a willingness to negotiate realistically, the case would have been settled long ago for the kind of money now being paid to the class.

7. Mr. Goteiner's contentions regarding his discussions with me and remarks I supposedly made with respect to Mr. Grosfeld, his evaluation of the case, etc., both at the mediation, on the plane thereafter and in subsequent conversations are incorrect [e.g., ¶¶13-15, 19 and 20]. To respond fully to this matter would require a lengthy statement of my recollection of the actual discussions which I believe is unnecessary at this point. Suffice it to note that I disagree with Mr. Goteiner's recollection. Mr. Goteiner's conjectures about defendants' intentions and Mr. Grosfeld from the nature of these conversations can best be responded to by reference to Alexander Pope's apt observation that "all seems infected that the infected spy, as all looks yellow to the jaundiced eye" [Essay on Criticism I, I. 358-59].

8. I have no knowledge of the settlement discussions before the Special Master in January 1995 to which Mr. Goteiner refers [¶16]. If such discussions took place, they apparently occurred when I was not at the conference, since I had been compelled to return to New York due to my wife's illness at that time. However, during this same period, plaintiffs' settlement posture with me had not changed.

9. Mr. Goteiner's remarks about statements I supposedly made regarding Mr. Wassigner (e.g., as "overly aggressive and contentious") and my "running his own Mutt and Jeff routine" [¶¶2 and 22] are not worth of response, other than to note that Mr. Goteiner is again seeking to create a misleading and incorrect impression by improper ad hominem advocacy.

10. Mr. Goteiner has either forgotten or chooses not to mention that I had previously talked to him, on a number of occasions, about the possibility of a settlement other than all in cash. He always responded that plaintiffs' counsel was not interested in anything other than a cash settlement in the amount he had demanded.

11. Mr. Goteiner inaccurately states the parties' positions up to and at the point of trial. As I have previously explained, plaintiffs were still insisting on a cash settlement at the level previously demanded (which was always $90 million).

12. Mr. Goteiner also incorrectly recites the background of his statements to the press just after the January 31 court session. Contrary to the understanding reached in the Court's chambers just before that court session, that the parties would not comment to the press, Mr. Goteiner chose to make a detailed, inaccurate and defamatory statement to the press. Mr. Goteiner also chose to use that statement to make remarks to the class regarding the nature and time of payment under the settlement, although the parties had agreed in the Stipulation of Settlement that plaintiffs' counsel would make no such direct or indirect communication to the class and that the only

communication to the class on those matters would come from the Settlement Administrator.

13. It is unfortunate that one must set the record straight on these matters; and I decline to indulge here in the kind of controversy which plaintiffs' counsel have repeatedly sought to engender throughout this proceeding. I have repeatedly attempted to avoid being drawn into such back-and-forth in the past, and have attempted to confine this declaration to the minimum necessary to contradict the more misleading assertions in Mr. Goteiner's declaration.

14. I declare the foregoing to be true under the penalties of perjury.

/s/ Martin I. Kaminsky
Martin I. Kaminsky

APPENDIX Q

Declaration of Paul M. Dodyk,
dated May 8, 1997

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

WILLIAM WATERS AND LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated, Plaintiffs, -against- INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, Individually and as Trustee of the Jason Grosfeld Trust, MULTIVEST REAL ESTATE, INC., S. S. MELBOURNE, INC., and THE CYPRESS, GROUP, INC., Defendants.	Case No. 90-6863 CIV-UNGARO-BENAGES DECLARATION OF PAUL M. DODYK DATED MAY 8, 1997

PAUL M. DODYK declares as follows:

1. I submit this declaration in response to Mr. Cooper's and Mr. Goteiner's declarations of May 5, 1997, which are inaccurate in the following material respects.

2. As the Cooper and Goteiner declarations admit, the lowest offer of settlement communicated to defendants by plaintiffs' counsel prior to January 26, 1997 was $90,000,000. The circumstances of that offer and the parties' negotiations up to September of 1996 are detailed in Mr. Kaminsky's declaration of May 8, 1997.

3. In September of 1996, I assumed responsibility for those negotiations which I conducted first with Mr. Cooper and later with Mr. Newman. I was advised of the prior negotiations between the parties, and, in particular, of Mr. Goteiner's continued insistence on a minimum of $90,000,000 up to September 1996. I undertook negotiations in September 1996 understanding that plaintiffs' last bid was $90,000,000, a fact which I discussed with Mr. Cooper on several occasions during the negotiation.

4. At no time prior to the evening of January 26, 1997, did Mr. Cooper or Mr. Newman make any settlement offer to me which was less than $90,000,000 and I do not understand Mr. Cooper to say the contrary.

5. During December of 1996, Mr. Cooper abruptly terminated negotiations prior to the Christmas holidays. I called him in an attempt to revive negotiations prior to Christmas. The call began quite civilly and Mr. Cooper and I resolved a number of outstanding differences amicably. I distinctly recall that toward the end of that call, Mr. Cooper turned to the question of the clear sailing agreement. Mr. Cooper told me, in no uncertain terms, that I would have to agree to a clear sailing agreement if I expected him to resume negotiations after the holidays. His language was preemptive and his voice was raised as he insisted that defendants must agree to a clear sailing agreement if negotiations were to resume. He left me in no doubt that defendants' acquiescence in that demand was a necessary condition to the resumption of negotiations. The content and manner of Mr. Cooper's expression left no question in my mind that his demand for a clear sailing agreement was non-negotiable. My associate, Mr. Schweber, who was on that call, has a similar recollection which is described in his declaration of this date. The change in Mr. Cooper's tone of voice and attitude was so marked that this conversation stands out very clearly in my mind to this day.

6. As Mr. Cooper admits, my comments before the Court during the week of January 26, 1997, were confined to the relationship between the proposed settlement amount and the class members' investment loss. I made no statement relating to plaintiffs' counsel's fees. I submitted no material to the Court which addressed counsel fees. The fact that I did not address the question of plaintiffs' counsel fee in any way is fatal to Mr. Cooper's attempt to read some consensual significance into my silence on that subject. The suggestion that silence implies consent may have some force, depending on the context, as to a subject which the parties are discussing. As to a subject not discussed, it obviously has none.

7. Mr. Cooper's suggestion that I should, for some reason, have pointed out that only a minority of the settlement class members would make claims is equally baseless. My knowledge of that fact was not imparted to me by The Garden City Group's engagement letter, as Mr. Cooper unfairly suggests. Any experienced securities lawyer, presumably including plaintiffs' counsel, would have known that only a minority of the class members could be expected to file claims in this case.

8. In any event, I had no reason to volunteer my expectation of the likely claim ratio during the week of January 26, 1997. In a reversionary settlement such as the case before the Court, the percentage of investment loss which a class member will receive if he or she files a claim is not dependent upon the number of persons filing claims. In this case, a filing class member will receive between 20% and 33-1/3% of his or her investment loss, irrespective of the number of claimants. Since the Court's appraisal of the fairness of the Settlement focussed on that percentage relationship, there was no reason for me to volunteer information concerning the expected claim ratio --- a fact which is further corroborated by plaintiffs' counsel's decision not to raise that matter.

9. Plaintiffs' counsel first misused the NERA Study in support of their fee application when counsel filed their fee application on February 20, 1997. In reviewing that application, it became clear to me that plaintiffs' counsel was attempting to justify their fee application by comparing apples and oranges. Specifically, it became clear that plaintiffs were comparing the NERA reports of the percentage relationship between fees awarded and the amounts which were actually distributed to settlement classes ("actual percentages") in other cases to the percentage relationship between their fee request and the purely nominal settlement amount ("nominal percentages") in this case.

10. Based on my experience in securities litigation, I was also aware that the fee requested in this case was a many times the fees awarded in other cases measured in relation to the actual distributions to the classes involved. With specific reference to the NERA Study, the fees awarded in the Eleventh Circuit have averaged less than 50% of the amounts actually distributed to the class, whereas the fees requested in this case will most likely be more than 200% of the amount to be actually distributed. Because plaintiffs' counsel's submission was based on an undisclosed comparison of nominal percentages with actual percentages and obscured the fact that plaintiffs' counsel's requested fees were in fact 400% greater than the average in the Eleventh Circuit, defendants were constrained to respond.

11. At no time did I tell Mr. Cooper that I believed Mr. Goteiner had not violated the Stipulation by trumpeting his supposed success through the newspapers. What I told Mr. Cooper was that the defendants would take no action to seek a remedy for Mr. Goteiner's breach of the Stipulation in light of the fact that Mr. Goteiner had apparently desisted after my initial warning to Mr. Cooper. Mr. Goteiner's attempt to bolster Mr. Cooper's claims by subscribing to the accuracy of Mr. Cooper's declaration is belied by the fact that he was not party to the conversation in which I told Mr. Cooper that

defendants did not presently intend to seek a remedy for Mr. Goteiner's breach of the Stipulation.

12. Mr. Goteiner seeks to justify his breach of the agreement by asserting that a reporter placed the call which Mr. Goteiner used to engage in communications in breach of the Stipulation. (§6.1) The fact that a reporter may have placed a call to Mr. Goteiner does not justify Mr. Goteiner's initiative in using that call to communicate with class members in clear breach of the Stipulation. The AP article appended to my Declaration of April 24, 1997 demonstrates Mr. Goteiner's breach beyond doubt. That article quotes Mr. Goteiner directly as saying that "as far as we know, this is by far the largest recovery that commodities customers have achieved from an organization like this . . . ." That self congratulatory advertising of this litigation was obviously initiated by Mr. Goteiner. Mr. Goteiner went on to proclaim on one of his favorite subjects that "most of the settlement money is coming from Detroit multimillionaire James Grosfeld". The article goes on to reveal a variety of aspects of the trial which unmistakably bear the mark of Mr. Goteiner's initiative in breach of the Stipulation and, at the very least, raise questions of fact as to Mr. Goteiner's conduct which cannot be resolved without an evidentiary hearing.

13. I declare the foregoing to be true under penalties of perjury.

/s/ Paul M. Dodyk
Paul M. Dodyk

May 8, 1997

APPENDIX R

Declaration of Matthew S. Schweber,
dated May 8, 1997

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

WILLIAM WATERS AND LINDA BARTHOLOMEW, individually and on behalf of all these similarly situated, Plaintiffs, -against- INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, Individually and as Trustee of the Jason Grosfeld Trust, MULTIVEST REAL ESTATE, INC., S. S. MELBOURNE, INC., and THE CYPRESS GROUP, INC., Defendants.	Case No. 90-6863 CIV-UNGARO-BENAGES DECLARATION OF MATTHEW S. SCHWEBER

Matthew S. Schweber declares as follows:

1. I have been associated with the law firm of Cravath, Swaine & Moore since the autumn of 1994 and am licensed to practice law in the State of New York.

2. I submit this declaration to respond to certain statements in Mr. Cooper's Declaration of May 5 of 1997.

3. Beginning in the autumn of 1996 and continuing through the consummation of the Settlement Agreement in January of this year, I assisted Mr. Dodyk in drafting the Stipulation of Settlement ("Settlement Agreement") and related ancillary documents and was responsible for transmitting, receiving and underscoring modifications to the drafts of these

documents as the modifications were agreed to by Mr. Cooper and Mr. Dodyk.

4. I was present for a conference call with Mr. Cooper and Mr. Dodyk last year during the week immediately prior to the Christmas holiday. At the outset of the conference call, Mr. Dodyk and Mr. Cooper amicably resolved certain outstanding disputes concerning various substantive provisions of the then operative draft of the Settlement Agreement. However, toward the end of the conference call, Mr. Cooper's negotiating posture abruptly changed from one of relative civility to one of intransigence. Mr. Cooper became adamant that without acquiescence by Mr. Dodyk to a "clear-sailing" agreement, any further negotiation about the outstanding issues in dispute would be futile because Mr. Cooper's partners would not agree to the Settlement Agreement without the existence of such a clause. As a result, Mr. Dodyk acceded to the "clear-sailing" agreement and Mr. Cooper and Mr. Dodyk concluded the call by agreeing to defer further negotiations on the then outstanding substantive issues of contention until after the holiday.

5. I declare the foregoing to be true under penalties of perjury.

/s/ Matthew S. Schweber
Matthew S. Schweber

May 8, 1997

APPENDIX S

Order Denying Defendant's Motion Pursuant to Fed. R. Civ. P. 52(b) and 59(e), filed May 8, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 90-6863-CIV-UNGARO-BENAGES

WILLIAM WATERS,
LINDA BARTHOLOMEW, et al,

Plaintiffs,

vs.

INTERNATIONAL PRECIOUS
METALS CORP., INC., et al.,

Defendants.

ORDER DENYING DEFENDANTS' MOTION PURSUANT TO FED.R.CIV.P.52(b) and 59(e)

THIS CAUSE is before the Court on Defendants' Motion Pursuant to Fed.R.Civ.P.52(b) and 59(e) to alter and amend the Court's Final Order and Judgment Approving Settlement filed April 22, 1997.

THE COURT has reviewed said Motion, Plaintiffs' Response and the pertinent portions of the record and, being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion is DENIED for the reasons set forth below.

After careful consideration of the relevant portions of the record and Defendants' arguments now submitted to the Court, the Court finds that Defendants' Motion is without merit and lacks any basis in law or fact leading the Court to no other conclusion than that the Motion is frivolous. The Court points

out that the Motion was filed as a Motion to alter or amend the final judgment entered by the Court in this case. However, even if the Defendants' arguments were entirely correct, there are no findings of fact in the Final Judgment entered by the Court on April 22, 1997 to be amended. The Final Judgment does not contain findings of fact because: (1) there was no true opposition at the Fairness Hearing to the Court's award of fees and costs -- no class members filed timely objections;[1] (2) the Defendants agreed not to oppose the Plaintiffs' fees and costs applications pursuant to the terms of the Stipulation of Settlement entered into between the parties; and (3) the form of Final Judgment was agreed to by the parties pursuant to the Stipulation of Settlement.

In any event, the Court rejects Defendants' contention that the Court misinterpreted the National Economic Research Associates ("NERA") Study, filed in the Court record on February 6, 1997 (D.E.1444). *See* Defendants' Motion at p.3. The Court is, and was at the time the Final Judgment was entered, well aware that there is a distinction between the ratio of attorneys' fees to the value of the class members' recovery in a common fund settlement in circumstances where the entire fund is distributed to class members asserting claims on a *pro rata* basis as opposed to circumstances where, as here, the defendants were able to successfully negotiate for a reversion of any unclaimed portion of the fund. As discussed below, the Court is satisfied, based on controlling law and the circumstances presented in this case, that the appropriate benchmark is necessarily a percentage of the gross judgment amount, *i.e.*, that amount which the Defendants agreed in the

---

[1] At the Fairness Hearing, one class member, Carol Orkin, came forward to express her objections to the terms of the settlement. However, she withdrew any objections to the award of attorneys' fees contemplated by the agreement at that time, prior to the entry of the Final Judgment. In addition, Pierre Parent, another class member, submitted correspondence, postmarked April 28, 1997, to the Court after the expiration of the deadline for filing objections regarding his views of the settlement.

Stipulation of Settlement to pay in order to create the Settlement Fund from which allowed claims and Plaintiffs' attorneys' fees and costs are payable, as opposed to the amount which will actually be paid from the Settlement Fund to class members pursuant to allowed claims.

The Court also rejects the Defendants' evidence in support of the present motion. Initially, the only evidence submitted by the Defendants in support of the motion was the affidavit of Michael R. Siebecker, an attorney who is associated with Cravath, Swaine & Moore (which, as one of Defendant Grosfeld's many law firms, has an interest in this litigation) and whose credibility is otherwise unknown to the Court. Mr. Siebecker's affidavit is based entirely on his personal evaluation of the NERA Study and heresay, allegedly derived from alleged communications with counsel of record for the parties involved in cases cited in the NERA study.[2] Moreover, although Defendants assert that the Court erroneously interpreted the NERA Study by assuming the settlement values cited in the study to be pre-reversion values rather than the actual amounts distributed to class members, nothing in the NERA Study or in Mr. Siebecker's affidavit reflects that, in compiling the information regarding the values of class action settlements used for the study, NERA considered anything other than the gross settlement values as reflected in the final judgments in the Eleventh Circuit cases.[3] While Mr. Siebecker may have conducted his own research to

---

[2] The Court also notes that the Defendants' Motion and supporting affidavit was filed and served three days prior to the hearing on the costs award - presenting circumstances under which the veracity of Mr. Siebecker's findings can hardly be tested prior to the hearing.

[3] During the last week in January, counsel for the parties aggressively sought to overcome the Court's reservations concerning the Stipulation of Settlement, including the then contemplated $13,333,333 fee application. In those discussions, counsel for both sides assured the Court that their experience and the findings contained in the NERA Study would support an attorneys' fee award in that amount.

find that reversions never came about in any of the Eleventh Circuit cases, he does not and presumably could not aver that NERA considered that fact in reaching the conclusions in the study.

Perhaps due to the apparent deficiencies in the Siebecker affidavit, the Defendants next submitted the declaration of Paul Dodyk, Esq., a Cravath, Swain & Moore partner and yet another of Defendant Grosfeld's many lawyers, on the eve of the recent hearing to determine the cost award. Mr. Dodyk avers that he spoke to one of the authors of the NERA study and that he was told by this individual (whose name is not given) that the NERA Study conclusions respecting attorneys' fee awards as a percentage of total recovery were based upon amounts actually disbursed to pay claims rather than final judgment amounts. Apart from the fact that Mr. Dodyk's interest in the case substantially undermines his credibility as a witness in this case, the undersigned otherwise rejects Mr. Dodyk's testimony in this regard as not credible since it: (1) conflicts with the position he took earlier in the case when he was seeking the Court's preliminary approval of the Stipulation of Settlement that the fee application specifically contemplated by the Stipulation of Settlement, i.e. $13,333,333 representing 33 and one third percent of the $40 million Settlement Fund, was reasonable and that its reasonableness was supported by his experience in other class actions and consistent with the conclusions contained in the NERA Study; (2) conflicts with the Defendants' express undertaking that they would not oppose the Plaintiffs' fee application so long as it did not exceed 33 and one-third percent of the $40 million Settlement Fund; and (3) conflicts with the term "settlement value" as used in the NERA Study, the plain meaning of which is the gross amount of the settlement pursuant to the Final Judgment and as stated in the Final Settlement Notice to class members. In fact, the Court's understanding of NERA's usage of the term "settlement value" has been confirmed to the

undersigned by Todd S. Foster, a representative of NERA, who was one of the authors of the NERA Study.

With respect to the legal sufficiency of the Defendants' proposed approach to the selection of an appropriate benchmark, the Court finds that Defendants' position is completely contrary to settled law based on Supreme Court precedent and authoritative treatises. In Boeing Co. v. Van Gemert, 444 U.S. 472 (1980), a case in which there was a common fund created for the benefit of the class members from which the defendant had a right to money that was never claimed by the class members, the defendant argued that the attorneys' fee award could not be awarded from the unclaimed portion of the fund. The Court rejected the defendant's argument and held that the attorneys' fees award should be based on the amount potentially available to claimants, regardless of the amount actually claimed. The Court explained, "[the absent class members'] right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel." Id. at 480; *see also* City of Riverside v. Rivera, 477 U.S. 561 (1986) (Court rejects defendant's proposition that fee awards under §1988 should necessarily be proportionate to the amount of damages plaintiff *actually* recovers). Moreover, in Newberg On Class Actions, one of the foremost authorities on class action litigation, the writers agree that the approach enunciated by the Court in Boeing settled the question of the appropriate benchmark to be used in a case such as this:

> When a lump sum has been recovered for a class, that sum represents the common fund benchmark on which a reasonable fee will be based. When, however, the defendant reserves the right to recapture any unclaimed portion of the common fund after class members have had an opportunity to make their claims against the fund, or when a recovery is based on a formula payment to each class member based on

> the level of relevant purchases or transactions involved of class members who file proofs of claim, the question arises concerning whether the benchmark common fund amount for fee award purposes comprises only the amount claimed by class members or that amount potentially available to be claimed. In Boeing Co. v. Van Gemert, the Supreme Court settled this question by ruling that class counsel are entitled to a reasonable fee based on the funds potentially available to be claimed, regardless of the amount actually claimed.

Herbert B. Newberg and Alba Conte, Newberg on Class Actions §14.03, at 14-14 (3rd ed. 1992); *see also* Koppel v. Wien, 743 F.2d 129 (2d Cir. 1984) (court rejected defendants' argument that attorneys' fees are not recoverable until participants actually receive a tangible benefit).

The Court further finds that it would be contrary to public policy, generally, and highly inequitable in this case, to take the approach advocated by the Defendants in the present motion. The Plaintiffs had no control over the Court's docket, and the Defendants engaged in litigation tactics that substantially prolonged the case. To allow the Defendants to succeed in taking the position they advocate at this point in time would, in effect, reward them for prolonging the litigation in anticipation that the longer the litigation went on, the greater the likelihood that the number of class members who could be located and who would submit claims would decrease. Moreover, there is a flaw inherent in the reasoning upon which the Defendants' position is based in that the number of class members who actually assert their claims cannot be said to indicate the level of success the Plaintiff class representatives and their counsel were able to achieve for the benefit of the class, in part due to the likelihood that that number will drop off after such a long period of litigation. As the Boeing Court pointed out, the availability of the full amount of the common fund created by the judgment to all class members is the benefit achieved by

class counsel's efforts, and the fact that a low number of class members may actually take advantage of the benefit by no means detracts from class counsel's achievements. Boeing, 444 U.S. at 480.

In light of the Court's approach to the issues raised by the Defendants, the Court reminds the parties that in Camden I Condominium Assoc. v. Dunkle, 946 F.2d 768 (11th Cir. 1991), the Eleventh Circuit determined, in 1991, that a benchmark of twenty-five percent of the common fund is generally appropriate in class actions. As the parties are aware, the use of a benchmark assumes that there will be adjustments to that figure based on a number of factors. Many of those factors are laid out in Johnson v. Georgia Highway Commission, 488 F.2d 714 (5th Cir. 1974), while a court may also consider other relevant factors such as the amount of time required to reach a settlement, whether there are any substantial objections to the settlement or fees, and the economics involved in prosecuting a class action. As the Court noted at the Fairness Hearing on March 31, 1997, nearly all of the relevant factors militated in favor of an upward adjustment to the benchmark (those factors that did not militate in favor of an upward adjustment were neutral). Nevertheless, the upward adjustment that the Court made, even if viewed from the perspective of the twenty-five percent benchmark suggested in Camden rather than the thirty percent benchmark selected by the Court, was minimal, approximately eight and one-third percent.

For the foregoing reasons, the Court will deny Defendants' Motion. Moreover, as noted at the Fairness Hearing, Defendants had already encroached upon the line separating them from a breach of the Settlement Agreement and Order approving the same by asserting specious objections to Plaintiffs' fee and cost application. This distasteful conduct has only been compounded by the present motion which, although disguised as a motion to amend, is actually a motion for reconsideration of the benchmark upon which the fee award

was based. Despite Defendants' self-serving pronouncements to the contrary, their contention can have only one objective — a reduction in the amount of fees already awarded to Plaintiffs' counsel pursuant to the agreement of the parties. This, of course, is a breach of the Stipulation of Settlement and furnishes an independent reason why this Court ought not entertain the Defendants' motion to amend.

Based on the foregoing, it is hereby

ORDERED AND ADJUDGED that Defendants' Motion Pursuant to Fed.R.Civ.P. 52(b) and 59(c) is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this [8] day of [May], 1997

APPENDIX T

Motion of Defendants-Appellants Pursuant to Federal Rule of Appellate Procedure 10(e) to Supplement the Record on Appeal with Affidavit of Paul M. Dodyk in Support Thereof, dated September 9, 1998

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 97-5074

WILLIAM WATERS AND LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated,

Plaintiffs-Appellees,

-against-

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, Individually and as Trustee of the Jason Grosfeld Trust, MULTIVEST REAL ESTATE, INC., S. S. MELBOURNE, INC., and THE CYPRESS GROUP, INC.,

Defendants-Appellants.

MOTION OF DEFENDANTS-APPELLANTS PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 10(e) TO SUPPLEMENT THE RECORD ON APPEAL WITH AFFIDAVIT OF PAUL M. DODYK IN SUPPORT THEREOF

CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Attorney for Defendants-Appellants

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with F.R.A.P. 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2, 26.1-3, and 27-1, undersigned counsel state that the following are interested persons and entities:

Gary S. Anderson (Counsel for Appellees/Plaintiffs)

Linda Bartholomew (Appellee/Plaintiff, Class Representative)

R. Lawrence Bonner (Counsel for Appellants/Defendants)

Victor F. Caldwell (Counsel for Appellants/Defendants)

Justin Y.K. Chu (Counsel for Appellants/Defendants)

Certified Class of MultiVest Options, Inc. for Customers (Appellees/Plaintiffs)

John L. Cooper (Counsel for Appellees/Plaintiffs)

Copart, Inc.

Cravath, Swaine & Moore (Counsel for Appellants/Defendants)

The Cypress Group, Inc. (Appellant/Defendant)

Paul M. Dodyk (Counsel for Appellants/Defendants)

Farella Braun & Martel LLP (Counsel for Appellees/Plaintiffs)

Neil A. Goteiner (Counsel for Appellees/Plaintiffs)

James Grosfeld, individually and as Trustee of the Jason Grosfeld Trust (Appellant/Defendant)

Nancy Grosfeld (Defendant in Conveyance Litigation below)

Homer & Bonner (Counsel for Appellants/Defendants)

Honigman, Miller, Schwartz & Cohn (Counsel for Corporate Defendants below)

International Precious Metals Corporation (Appellant/Defendant)

Robert M. Jackson (Counsel For Corporate Defendants below)

Martin I. Kaminsky (Counsel for Appellants/Defendants)

Karen P. Kimmey (Counsel for Appellees/Plaintiffs)

Jeffery R. Knight (Counsel for Appellants/Defendants)

Eric G. Lipoff (Counsel for Appellees/Plaintiffs)

Edward T. McDermott (Counsel for Appellants/Defendants)

MultiVest, Inc. (Appellant/Defendant)

MultiVest Real Estate, Inc. (Appellant/Defendant)

Jeffrey P. Newman (Counsel for Appellees/Plaintiffs)

Pollack & Kaminsky (Counsel for Appellants/Defendants)

L. Louis Raring (Counsel for Appellees/Plaintiffs)

Raring & Lipoff (Counsel for Appellees/Plaintiffs)

S.S. Melbourne, Inc. (Appellant/Defendant)

Michael R. Siebecker (Counsel for Appellants/Defendants)

The Honorable Ursula Ungaro-Benages (Trial Judge below)

Steven C. Wasinger (Counsel for Corporate Defendants below)

William Waters (Appellee/Plaintiff, Class Representative)

C. Brandon Wisoff (Counsel for Appellees/Plaintiffs)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 97-5074

WILLIAM WATERS AND LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated,

Plaintiffs-Appellees,

-against-

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, Individually and as Trustee of the Jason Grosfeld Trust, MULTIVEST REAL ESTATE, INC., S. S. MELBOURNE, INC., and THE CYPRESS GROUP, INC.,

Defendants-Appellants.

MOTION OF DEFENDANTS-APPELLANTS TO SUPPLEMENT THE RECORD ON APPEAL PURSUANT TO FED. R. APP. P. 10(e)

PLEASE TAKE NOTICE that before the Eleventh Circuit Court of Appeals, Elbert P. Tuttle Court of Appeals Building, 56 Forsyth Street, N.W., Atlanta, Georgia, 30303, and for the reasons set forth in the affidavit of Paul M. Dodyk, Esq., Defendants-Appellants hereby move this Court to supplement the record on appeal pursuant to Fed. R. App. P. Rule 10 (e) to

include the documents appended to the affidavit of Paul M. Dodyk, Esq., sworn to September 9, 1998.

September 9, 1998

CRAVATH, SWAINE & MOORE,

by

/s/ Paul M. Dodyk
Paul M. Dodyk
A member of the Firm

Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Martin I. Kaminsky
POLLACK & KAMINSKY,
114 W. 47th Street
New York, NY 10036
(212) 575-4700

R. Lawrence Bonner
HOMER & BONNER, P.A.,
International Place-34th Fl.
100 Southeast 2d Street
Miami, FL 33131

Attorneys for Defendants-Appellants

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 97-5074

WILLIAM WATERS AND LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated, Plaintiffs-Appellees, -against- INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, Individually and as Trustee of the Jason Grosfeld Trust, MULTIVEST REAL ESTATE, INC., S. S. MELBOURNE,INC., and THE CYPRESS GROUP, INC., Defendants-Appellants.	SUPPORTING AFFIDAVIT OF PAUL M. DODYK

STATE OF NEW YORK,)
) ss.:
COUNTY OF NEW YORK,)

PAUL M. DODYK, being duly sworn, deposes and says:

1. I am a member of the firm of Cravath, Swaine & Moore, Worldwide Plaza, 825 Eighth Avenue, New York, NY 10019, counsel to Defendants-Appellants in the above-captioned action. I am admitted to practice before the

Eleventh Circuit and submit this Affidavit in Support of Defendants-Appellants' Motion to Modify the Record on Appeal pursuant to Federal Rule of Appellate Procedure 10(e).

2. This is an appeal by Defendants-Appellants from orders entered by the district court in the administration of the settlement of a securities/commodities class action. One of the issues of this appeal relates to the fees awarded plaintiffs' counsel by the district court. Appellants' position is that the fees awarded must be based on the actual distribution made to the class. More specifically, appellants believe that the district court's award of fees of $13,333,333 and expenses of $2,400,204 in a case where the class distribution will be only $6,451,399 is an abuse of discretion.

3. Since the claims administration process continued beyond the time appellants filed their notice of appeal in this matter, the Settlement Administrator did not prepare the Settlement Administrator's Final Claims Determination Report ("Final Report") until after the record had been transmitted to this Court by the clerk of the district court. Review of the Final Report is necessary for this Court to find the amount of the actual class distribution. Accordingly, appellants submit the Final Report herewith as Exhibit D.

4. During the course of proceedings below, the district court erroneously opined that appellants' counsel had supported plaintiffs' counsel's fee application. (R35-1544; RE-9) In fact, counsel for appellants at no time made any statement to the court which supported the reasonableness of plaintiffs' counsel's fee application or was in any way inconsistent with their position that the fee must be assessed in relation to the actual class distribution. The transcripts of the hearings leading up to the district court's preliminary approval of the settlement on January 31, 1997, show no such statement. (R126-1442; R127-1440; R128-1441; R129-1434) However, counsel for Plaintiffs-Appellees has

asserted that such statements were made, presumably during certain off-the-record conversations with the court, relying on the district court's erroneous observations in its order of May 8, 1997. (R35-1544; RE-9) To protect their clients against those erroneous and unsupported charges, appellants herewith submit the affidavits of R. Lawrence Bonner, Esq., Paul M. Dodyk, Esq., and Martin I. Kaminksy, Esq. who were the counsel involved in those conversations.

5. Appellants believe that counsel for Plaintiffs-Appellees adopted an unusual reversionary form of settlement in this case for the purpose of asserting their exorbitant fee claim, with knowledge that only a small minority of the class members would file claims. Counsel for Plaintiffs-Appellees have stated that they were surprised by the relatively low number of class members who filed claims. However, counsel for Plaintiffs-Appellees were aware of the fact that the receiver for MOI received no more than 3,500 claims when it solicited 28,000 MOI customers some years ago. To establish that Plaintiffs-Appellees' counsel knew that no more than 3,500 of 28,000 of MOI's customers had responded to an earlier solicitation by MOI's receiver, appellants submit the affidavit of Amy R. Gustafson, Esq., counsel for Plaintiffs-Appellees, filed below but not of record, which admits knowledge of the scope of the receiver's mailing list.

6. This Court has the power to supplement the record by virtue of Federal Rule of Appellate Procedure 10(e) and its inherent judicial authority. Appellants believe the need for supplement of the record is established by the statements made above. Because this application involves material which contradicts certain statements made by the district court which relate to appellants' contention that the district court has abused its authority, appellants believe application for the Court of Appeals is appropriate under the circumstances.

7. Appended hereto are true an correct copies of the following documents:

Exhibit	Document
A.	Affidavit of Paul M. Dodyk, Esq., dated September 9, 1998;
B.	Declaration of Martin I. Kaminsky, Esq., dated August 28, 1998;
C.	Affidavit of R. Lawrence Bonner, Esq., dated August 13, 1998;
D.	Draft of Settlement Administrator's Final Claims Determination Report, dated August 12, 1998; and
E.	Declaration of Amy R. Gustafson, Esq., dated August 10, 1993.

/s/ Paul M. Dodyk
Paul M. Dodyk

Sworn to before me this
ninth day of September, 1998

Notary Public

[Exhibit A]

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

WILLIAM WATERS AND LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated,

Plaintiffs-Appellees,

-against-

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, Individually and as Trustee

of the Jason Grosfeld Trust, MULTIVEST

REAL ESTATE, INC., S. S. MELBOURNE, INC., and THE CYPRESS GROUP, INC.,

Defendants-Appellants.

No. 97-5074

AFFIDAVIT OF PAUL M. DODYK

SWORN TO SEPTEMBER 9, 1998

PAUL M. DODYK, being duly sworn, deposes and says:

1. I submit this affidavit to set forth the nature of certain statements by defendants' counsel in the United States District Court for the Southern District of Florida during the week of January 26-31, 1997, during the course of settlement of this

securities/commodities class action. This affidavit is necessitated by Plaintiffs-Appellees' counsel's misrepresentations that defendants' counsel made off-the-record statements before the district court which are inconsistent with Defendants-Appellants' position before this Court that fees and expenses of counsel for Plaintiffs-Appellees should be assessed relative to the actual distributions made to the plaintiff class in this class action.

2. I am a partner in the litigation department of Cravath, Swaine & Moore with which I have been associated since 1968. Prior to that time I was a Professor of Law at Columbia University School of Law (1965-1971) and clerk to the Hon. Potter Stewart, Associate Justice of the United States Supreme Court (1964-65).

3. I represented Defendants-Appellants in the above-captioned litigation in settlement negotiations from September 1996 through January 1997. I was associated with Martin I. Kaminsky, Esq. of the New York bar and R. Lawrence Bonner, Esq. of the Florida bar who served as trial counsel for Defendants-Appellants.

4. Defendants-Appellants reached a settlement with Plaintiffs-Appellees in the late evening of Sunday, January 26, 1997. During the week of January 26, I and Messrs. Bonner and Kaminsky participated in certain discussions in the district court. More specifically, I participated in discussions on January 28, 29 and 31 which were transcribed. Messrs. Bonner and Kaminsky participated in discussions on January 27, 1997 which were transcribed. In addition, I participated in off-the-record discussions with the court in person on January 28, 1997 and January 31, 1997 and by telephone on January 29, 1997, all of which were suggested by the Court. At no time during any of those discussions did I or any other counsel representing Defendants-Appellants make any statement whatsoever concerning Plaintiffs-Appellees' counsel's fees or expenses except for certain comments made by Mr. Kaminsky on

January 27, 1997, concerning the fact that the class settlement was not conditioned on the court's approval or disapproval of plaintiffs' counsel's fees and the amount of plaintiffs' counsel's expenses. (R126-1442 at 8260, 8268, 8272, 8276-77 and 8281-82) At no time did I or any other counsel representing Defendants-Appellants make any statement in support of the reasonableness of plaintiffs' counsel's anticipated fee application or in conflict with Defendants-Appellants' consistent position that plaintiffs' counsel's fees should be set in relation to the actual distribution to the class.

5. Off-the-record discussions on January 28, 1997 consisted of a description of the settlement and responses to questions posed by the court. I was accompanied by Messrs. Bonner and Kaminsky at that session. During the course of those discussions, counsel for Plaintiffs-Appellees represented that the projected Distribution Ratio in this case of 20% to 33-1/3% of the class members' investment losses compared favorably to the ratio of settlement funds to investment losses in other settled securities cases. Defendants' counsel concurred in that assessment, drawing upon their own experience in such cases. At no time during this discussion did any defendants' counsel make any comment about the amount of plaintiffs' counsel's fees or expenses or about the absolute amount of the expected payout.

6. Prior to the court hearing of January 31, 1997, I participated in a conversation with Mr. John Cooper of plaintiffs' counsel and the district court judge concerning a dispute which had arisen concerning the rate of interest to be paid on the promissory notes to be issued as part of the settlement. During the week of January 26, 1997, the parties and the court also discussed the letter of credit to be issued to secure defendants' obligations, the nature and amount of the security to secure those obligations pending issuance of the letter of credit and the financial position of defendants insofar as it related to the enforceability of defendants' obligations. The court also discussed with counsel for Plaintiffs-Appellees

waiver of their right to appeal from the court's determination of their fees.

7. All of the statements made by defendants' counsel during the week of January 26, 1997 during the transcribed court sessions are reflected in the transcripts thereof. (R126-1442; R127-1440; R128-1441; R129-1434) The Court will find no statement of any kind by any defendants' counsel concerning the amount of the fees or expenses to be claimed by plaintiffs' counsel except for the statement by Mr. Kaminsky of the amount of expenses he understood plaintiff's counsel would be claiming. (R126-1442 at 8268) At no time during the off-the-record discussions during the week of January 26, 1997 did any defendants' counsel make any statement concerning the amount of plaintiffs' counsel's anticipated fee and expense application. More specifically, no defendants' counsel made any off-the-record statements during the week of January 26, 1997 which supported the reasonableness of plaintiffs' counsel's anticipated fee request or in conflict with their consistent position that plaintiffs' counsel's fee must be determined in relation to the actual distribution to the class. To the extent that the district court's opinion of May 8, 1997 (R35-1544; RE-9) may be understood to contain any statements to the contrary, they are in error.

\s\ Paul M. Dodyk
Paul M. Dodyk

Sworn to before me this
ninth day of September 1998

Notary Public

[Exhibit B]

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

WILLIAM WATERS AND LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated,

Plaintiffs-Appellees,

-against-

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, Individually and as Trustee of the Jason Grosfeld Trust, MULTIVEST REAL ESTATE, INC., S. S. MELBOURNE, INC., and THE CYPRESS GROUP, INC.,

Defendants-Appellants.

Dkt. No. 97-5074

DECLARATION OF MARTIN I. KAMINSKY

MARTIN I. KAMINSKY, declares under penalty of perjury:

1. I am a member of the firm of Pollack & Kaminsky and a member of the Bar of this Court. I was one of the lead trial counsel for defendants in this action in the United States District Court for the Southern District of Florida.

2. I submit this declaration to set forth the nature of statements by defense counsel in the District Court during the week of January 27-31, 1997, regarding the fees and expenses to be sought by counsel for plaintiffs-appellees in connection with the settlement of this action.

3. The remarks I made during the week of January 27 regarding the fees and expenses of plaintiffs-appellees' counsel are those transcribed at the hearing of January 27. My remarks on January 27, as reported in the transcript of that day, were intended to make clear that the settlement was not conditioned upon the Court's determination of the amount to be awarded to plaintiffs' counsel for their fees and alleged expenses, and otherwise to respond to questions by the Court (e.g., as to whether I had been told by plaintiffs' counsel how much they contended their expenses had been).

4. I participated in some of the off-the-record discussions with the Court (in Chambers and over the telephone) at various points during that week. I did not make any statement in those off-the-record discussions, regarding the nature, amount, propriety or other aspects of the fees and expenses which would be sought or awarded to plaintiffs' counsel.

5. Paul M. Dodyk of Cravath, Swaine & Moore was defendants' settlement counsel, and the principal spokesperson for defendants in the discussions with the Court during the week of January 27-31, 1997. R. Lawrence Bonner of Homer & Bonner, the other lead trial counsel for defendants, also participated in the discussions that week. Mr. Dodyk discussed the nature of the settlement and how it compared, in his experience, with settlements of other class actions, principally securities class actions; however, that discussion did not concern the fees or expenses to be awarded to plaintiffs' counsel. Neither Mr. Dodyk nor Mr. Bonner said anything regarding the amount of fees and expenses being sought by plaintiffs' counsel or otherwise regarding the anticipated applications by plaintiffs' counsel for an award of fees and expenses.

6. During the January 27-31, 1997 discussions, the Court conversed at times with plaintiffs' counsel of aspects of their anticipated fee application (e.g., regarding whether they would waive their right to appeal from the Court's determination of

their fees, and whether they would be seeking their fees in a mixture of cash and notes or all in cash. At one point, with permission of defense counsel, the Court also spoke privately with plaintiffs' counsel. However, there was no discussion in which defense counsel said anything regarding the amount to be awarded to plaintiffs' counsel.

\s\ Martin I. Kaminsky
Martin I. Kaminsky

[August 28, 1998]

[Exhibit C]

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

WILLIAM WATERS and LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated. Plaintiffs-Appellees, vs. INTERNATIONAL PRECIOUS METALS CORP., MULTIVEST, JAMES GROSFELD, Individually and as Trustee of the Jason Grosfeld Trust, MULTIVEST REAL ESTATE, INC., S.S. MELBOURNE, INC. and THE CYPRESS GROUP, INC., Defendants-Appellants.	Docket No. 97-5074 **AFFIDAVIT OF R. LAWRENCE BONNER**

R. LAWRENCE BONNER, being duly sworn, deposes and says:

1. I am a partner in the firm of Homer & Bonner, P.A. and a member of the Bar of the Eleventh Circuit Court of Appeals. I acted as co-counsel for defendants-appellants at trial in the above-styled action in the United States District Court for the Southern District of Florida.

2. I submit this affidavit to set forth the nature of the statements made by defendants-appellants' counsel in the District Court during the week of January 27-31, 1997

regarding the fees and expenses sought by plaintiffs-appellees' counsel for the settlement of this action.

3. I attended the discussions held in the District Court during the week of January 27-31, 1997. I also attended off-the-record discussions before the District Court. I did not make any comments or remarks during the week of January 27-31, 1997 regarding the fees and expenses sought by or to be awarded to counsel for plaintiffs-appellees.

4. On April 25, 1997, the Court inquired of me whether the defendants-appellants were taking the position that the plaintiffs-appellees had breached the Stipulation of Settlement by requesting a fee award of $13 million. I responded to the Court by stating that plaintiffs-appellees' request did not constitute a breach of the Stipulation of Settlement. The transcript of this colloquy is attached as Exhibit A hereto.

5. Paul Dodyk of Cravath, Swaine & Moore in New York was defendants-appellants' settlement counsel. Mr. Dodyk conducted most of the discussions on behalf of defendants-appellants with the District Court during the week of January 27-31, 1997. Martin Kaminsky of Pollack & Kaminsky in New York also participated in some of the discussions with the District Court during the week of January 27-31, 1997.

6. Mr. Dodyk discussed the nature of the settlement in this action and its comparison to other class action settlements, primarily securities class actions. Mr. Kaminsky made certain statements on the record which clarified that the settlement was not conditioned upon the Court's determination of the amount to be awarded to plaintiffs-appellees' counsel for their fees and expenses. To my recollection, neither Mr. Dodyk nor Mr. Kaminsky made any statements to the Court during the week of January 27-31, 1997 regarding the reasonableness of the fees and expenses to be sought by plaintiffs-appellees' counsel.

7. Defendants-appellants have consistently argued to the District Court that the amount of attorneys' fees sought by plaintiffs-appellees' counsel should be assessed in relation to the actual distributions made to the plaintiff class members in this action.

\s\ R. Lawrence Bonner
R. LAWRENCE BONNER

Sworn to before me this [13] day of August, 1998.

_____
Notary Public

MR. WISOFF: I'm sorry. What was that number again, Your Honor?

THE COURT: $15,611.80.

MR. WISOFF: Thank you.

THE COURT: Plus $15,000 to cover future expenses. So, it seems to me that with respect to the amounts that Ms. Craig supplied in connection with her affidavit, that needs to be offset by $15,000. Okay?

And as to the Zuckerman information, my final ruling on Zuckerman, I'll provide it to you on Monday. And then what I'll ask is that you submit an amended final judgment.

Now, I think I have a question for the defense, and it's essentially a yes-or-no question, and the question is this: Is it the defendants' position that by requesting a fee award of $13 million or so the plaintiffs have breached the stipulation of settlement? Yes or no.

Could I get an answer?

MR. BONNER: I will give you one. One second, Your Honor. I want to make sure I answer it properly.

THE COURT: Let the record reflect that it is, by my clock, 11:37. Take your time.

MR. BONNER: It is still 11:37. The answer is, as you phrase the question, no.

THE COURT: Okay. All right. Well, I could say a lot. I'm going to save it for my order.

W G R

[Exhibit D]

Revised Draft 8/12/98

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

WILLIAM WATERS AND LINDA BARTHOLOMEW individually and on behalf of all those similarly situated, Plaintiff -against- INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., *et al.*, Defendants.	Case No. 90-6863 Civ-UNGARO-BENAGES

SETTLEMENT ADMINISTRATOR'S FINAL CLAIMS DETERMINATION REPORT

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

G. PETER BUCHBAND, being duly sworn, deposes and says:

1. I am President of the Garden City Group, Inc. ("GCG"). GCG was engaged to serve as Settlement Administrator in the administration of the settlement in the above captioned litigation (the "Settlement"). I am personally familiar with the facts described herein. This Affidavit is submitted as the Settlement Administrator's Final Claims Determination Report under §6.3(b) of the Stipulation of

Settlement (the "Stipulation") previously approved by this Court. The Settlement Administrator previously presented its Revised Initial Distribution Report (the "Initial Report") to this Court on October 6, 1997.

2. In the aggregate, through [July 31, 1998], GCG received [6,783] Proof of Claim forms, (upon review, one claim was created from a timely filed Proof of Claim, where the claimant had combined transactions for two eligible accounts), including 6,770 that were reported in the Initial Report. In this process, 6,602 claim records were created, including 6,589 that were reported in the Initial Report. (The difference of 181 between claim submissions and claim records is accounted for by multiple submissions from some claimants for the same MultiVest account.)

3. The GCG staff processed the [13] additional Proof of Claim forms received since September 26, 1997, and reviewed the Monthly Statements submitted by claimants, as required by the Stipulation. The Proof of Claim forms and the supporting documents provided by these [13] claimants were scanned into GCG's computer system, bringing the total number of images in the databases to [95,403]. The GCG staff continued to use evaluation and processing procedures previously approved, as described in the Initial Report.

4. Deficiency letters were generated by GCG's computer system in accordance with the Stipulation and the Court's Orders of October 27, 1997, January 14, 1998 and January 30, 1998. These letters were mailed to various categories of claimants on January 30, 1998, February 2, 1998, February 3, 1998, May 22, 1998, May 26, 1998 and July 6, 1998. Final rejection letters were sent to (a) the 35 claimants who had not responded to the deficiency letters representing their signature to the Release; (b) the 22 intrinsically ineligible claimants; (c) the 27 claimants who had not signed the release and had also failed to submit their Proof of Claim timely; and (d) the 5 claimants who had submitted a Proof of Claim after GCG

mailed the first Deficiency notices. Of these, 33 claimants responded providing their signature; one intrinsically ineligible claimant responded providing the Monthly Statements to process his claim; 22 of the 27 claimants who had failed to submit their Proof of Claim timely and had also failed to sign the release, responded. No response was received from the 5 newly filed late claimants. On July 6, 1998, GCG generated and mailed a Final Notice of Rejection with a 20- day response as described in §6.4(d) and §6.4(e) of the Stipulation of Settlement of the 19 intrinsically ineligible claimants who had failed to respond to the Notice of Rejection previously sent to them. Fifteen of the 19 claimants responded to the Final Notice of Rejection either requesting that we obtain the Monthly Statements from MultiVest or by providing the Monthly Statements to process their claim. Two of the claimants who requested that we obtain their statements from MultiVest, did not fit the definition of the Class and are intrinsically ineligible. These 2 claims remain on Schedule D and the 13 eligible claims have been moved to Schedule A-1. In the aggregate, 2,195 deficiency letters were sent out and 1,138 claimants provided responses to the deficiency notices sent them, and these were evaluated in accordance with the provisions of the Stipulation and the Court's orders.

5. The GCG staff processed and evaluated the responses to the deficiency letters, and continued to obtain Monthly Statements from MultiVest as directed by claimants who could not provide such from their own records.

6. Certain claimants advised GCG that they disagreed with GCG's determination of their status, and these claims were re-reviewed by project staff and GCG's internal Quality Assurance Unit, with the following results:

(a) Of the timely deficient claims with missing Monthly Statements, listed on Schedule B-3 of the Initial Report, 10 claimants objected to the Settlement Administrator's determination of deficiency. A review of these claims by our

Quality Assurance staff, determined that there were no other Monthly Statements issued to these claimants. Accordingly, the 10 claims are included in Schedule A-1, attached hereto and should be considered eligible. These claims have therefore been removed from Schedule B-3 (the Revised List of Timely Claims with Missing or Illegible Monthly Statements). We respectfully request that the Court accept these as eligible timely filed claims.

(b) Of the 257 claims GCG categorized as being untimely filed, as listed on Schedules C-1 and C-2 of the Initial Report, 95 claimants objected to the Settlement Administrator's determination of untimely filing. Upon further review of all of the late filed claims by our Quality Assurance staff, it was determined that 41 of the claims had been erroneously determined to have been late, because of data interpretation and/or the extended filing deadlines granted to these claimants by the Court's Order of April 2, 1997. Accordingly, 36 of these 41 claims, also listed in Exhibit A-1 Addendum, attached hereto, should be considered eligible and therefore removed from Schedule C-1 (the Revised List of Late Filed Claims Otherwise Complete). We respectfully recommend that the Court accept these as eligible timely filed claims. Four claims have been moved to Schedule B-3 (the list of Timely Deficient Claims with Missing Monthly Statements) and one claim has been moved to Schedule D (the List of Intrinsically Ineligible Claims).

Quality Assurance.

7. GCG's quality assurance staff tested and performed analysis to ensure the integrity of GCG's computer systems abilities to support all the processes involved. Our standard testing consist of checking accuracy, completeness and clarity. GCG has reviewed the categories of claimants to determine the final status of all Schedules and has continued to conduct ongoing analysis of the data to ensure reasonableness and completeness of the data provided by claimants.

8. As a result of the responses to the deficiency letters and re-reviews of claims previously filed, the Settlement Administrator has categorized the [6,602] claims received as follows, using the same category types as were described in the Initial Report:

Schedule A-1: 5038 timely filed eligible claims, representing $34,227,563.26 in compensable losses net of $50 charges assessed for Monthly Statements provided by MultiVest in accordance with the provisions of the Stipulation; these claims are listed in Schedule A-1 hereto;

Schedule A-2: 14 timely filed eligible claims that (a) were received timely and are completed; (b) for which the claimants requested us to obtain their Monthly Statements from MultiVest; and (c) whose Estimated Settlement Amounts calculate to less than $50. These claims are therefore not eligible to receive a distribution from the Settlement fund, and we plan to send these claimants "no loss" letters rather than distributions;

Schedule B-1: No claims remain in this category. Two claims have been moved to schedule D;

Schedule B-2: No claims remain in this category;

Schedule B-3: 1176 timely filed claims with missing or illegible Monthly Statement(s). The Settlement Administrator understands that these claims are the subject of an appeal pending in the Court of Appeals.

	If allowed, these claims would represent $8,328,699.53 in compensable losses[4];
Schedule B-4	104 timely feild claims that were supported by late filed Monthly Statements. The Settlement Administrator understands that these claims are the subject of an appeal pending in the Court of Appeals. If allowed, these claims would represent $665,601.37 in compensable losses;
Schedule C-1:	212 late filed claims that would otherwise be eligible. The Settlement Administrator understands that these claims are the subject of an appeal pending in the Court of Appeals. If allowed, these claims would represent $1,527,113.67 in compensable losses;
Schedule C-2:	16 late filed claims that also incorporate other unresolved deficiencies;
Schedule D:	42 claims that are intrinsically ineligible.[5]

---

[4] This number includes 1 additional claim (account #40529) that initially was thought to have had a gain based on the documentation provided by the claimant in support of her claim, but upon re-review was later determined to have suffered a loss when the complete trading history was received from MultiVest.

[5] This number has been reduced by 14 claims because of the 20 claims that had been determined to be ineligible because the claimants initially submitted inappropriate documentation, responded to the final rejection letters. The 14 eligible claims include two claims (account #30316, $5,967.61 and account #30222, $7,709.91) for which MultiVest has advised us that they are unable to find all Monthly Statements. Absent the Monthly Statements, we have used the values shown in Plaintiffs' Update of Defendants' Submission "A" and "B" in Compliance with the Court's August 12, 1996 Order, to determine the compensable losses for these two

Distribution of Settlement Fund

9. The Settlement Administrator believes that at this time, the eligibility of all claims has been determined and the disputed claims that are the subjects of appeals that are pending before the Court of Appeals. Accordingly, the Settlement Administrator believes that a first distribution (the "First Distribution") of the Settlement Fund, less appropriate reserves as described further below, can now be made to those undisputed claimants who have been determined to be eligible in accordance with the Settlement Agreement and the orders of this Court.

10. The Stipulation at §§ 6.2(e) and 6.3(b) calls for the Settlement Administrator, subject to Court approval, to make payments to eligible claimants from the cash portion of the Settlement Fund, to distribute Promissory Notes and to advise the Payor under the Master Promissory Note of any reduction in the outstanding Principal Sum of that note and the maximum drawable amount under the Irrevocable Letter of Credit. However, the several appeals pending in the Court of Appeals complicate the calculations.

11. The Settlement Administrator believes that all eligible claimants, including such claimants as may become eligible as a result of the appeals process, should receive the same ratio of cash to notes. The Settlement Administrator believes that the easiest way to accomplish this objective is to pay out the cash portion of the Settlement Fund after taking appropriate reserves as discussed further below, and to pay each eligible claimant the remainder of his/her entitlement as a Promissory Note. In the event that the resolution of the appeals should result in additional cash being available because of the ineligibility of some or all of the appealed claims and/or unused reserves, such funds would be used to reduce the principal amounts of the Notes. The Settlement Administrator has discussed the

---

claims.

mechanics of such a situation with the First National Bank of Chicago NBD ("First Chicago"), the Paying Agent, and First Chicago has advised that such paydowns can be readily accomplished without the need for creditors to present their Note certificates.

Estimate of the Net Settlement Fund

12. As presented in the Initial Report, the balance in the cash portion of the Settlement Fund at September 24, 1997 was $5,176,668.62. Subsequently, the Settlement Fund received an interest payment of $155,833.33 from the Payor, has received $207,695.46 in investment interest income through July 31, 1998, and has disbursed a total of $547,542.42 in compliance with Orders of this Court. Thus, the balance of the Fund at July 31, 1998 is $4,992,654.99.

13. The Settlement Administrator respectfully submits for the Court's consideration the establishment of the following reserves from the cash and note portions of the Settlement Fund, based on the prior orders of this Court concerning reserves for (a) potential fees and expenses of plaintiffs' counsel including the unpaid portion of fees previously awarded and fees and expenses in connection with the pending appeals and (b) the ongoing administration of the Settlement. We also recommend the establishment of a reserve to pay the potential federal income tax liabilities of the Settlement Fund.

Cash Reserves	
Plaintiffs' appeals fee/expense reserve	$ 500,000
Administration reserve[6]	383,000
Tax reserve	25,000
Disputed claim reserve @ 44.28%	901,983
Contingency reserve	350,000
Total Recommended Cash Reserves:	**$ 2,159,983**

Note Reserves	
Plaintiffs' counsel fees awarded but unpaid	$ 10,733,537
Plaintiffs' appeals fee/expense reserve	500,000
Disputed claim reserve @ 55.72%	1,098,866
Total Recommended Note Reserves:	**$ 12,332,403**

14. If the Court were to approve the establishment of the recommended reserves, 44.28% of each eligible claimant's payment in the First Distribution would be made in cash, and the remaining 55.72% in Notes. The Settlement Administrator has calculated the amounts due in cash and Notes to each eligible claimant. Of the 6,530 claimants listed in Exhibits A-1, B-3, B-4 and C-1, a total of 1,073 would receive Notes in face amounts less than $200, and 342 would receive Notes in face amounts less than $100. Considering the cost of generating and subsequently administering the Notes, the Settlement Administrator respectfully suggests the establishment of a "convenience class" of claimants elibible for Notes below $200 or $100, who would be paid entirely in cash. If this suggestion were to be approved by the parties and the Court, if the threshold were set at the $100 Note level, 342 claims totaling approximately $27,867 would be paid entirely

---

[6] The recommended Administration Reserve is higher by about $250,000 than the amount recommended in the Initial Report and approved by the Court. This recommended increase is brought about by the unforeseen complexities involved in the deficiency process and the additional tasks that the Settlement Administrator may have to undertake as a result of the appeals that have been taken.

in cash, and the cash to Note ratio for the others would become approximately 44.09% to 55.91%. If the threshold were set at the $200 Note level, claims totaling approximately $249,914 would be paid entirely in cash, and the cash to Note ratio for the others would become approximately 42.63% to 57.37%.

15. Based on the foregoing, the Settlement Administrator has calculated the maximum amount of Notes that may have to be issued to be $3,594,720. Accordingly, assuming the establishment of the reserves cited in ¶ 12, above, the defendants' total potentially remaining note liabilities amount to $75,927,123. Pursuant to § 6.2(e) of the Stipulation, the Settlement Adminstrator is obligated to advise the Payor of any cash or the Master Promissory Note that he will no longer require to complete the payment of fees, expenses and distributions contemplated by the Stipulation. In its Order of January 27, 1998, the Court denied defendants' request for reduction of the Master Promissory Note and the Letter of Credit, stating that these instruments are not subject to reduction *at this time* (emphasis added). The Settlement Administrator does not know the extent of the temporal restriction that the Court intended in the January 27, 1998 Order.

_____

G. PETER BUCHBAND

Sworn to before me this
_____day of August 1998

_____

Notary Public

[Exhibit E]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

WILLIAM WATERS AND LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated, Plaintiffs, vs. INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, Individually and as Trustee of the Jason Grosfeld Trust, MULTIVEST REAL ESTATE, INC., S. S. MELBOURNE, INC., and THE CYPRESS GROUP, INC., Defendants.	CASE NO. 90-6863 CIV-UNGARO-BENAGES Magistrate Judge Brown DECLARATION OF AMY R. GUSTAFSON IN SUPPORT OF PLAINTIFFS' MOTION FOR APPROVAL OF FORM AND METHOD OF SERVICE OF CLASS NOTICE AND RELATED MATTERS

I, Amy R. Gustafson, declare:

1. I am an attorney at law and an associate at Farella, Braun & Martel, counsel for the plaintiff class herein. I have personal knowledge of the matters stated herein and could and would testify competently thereto, under oath, if required.

2. I receive from the attorneys representing the receiver for MultiVest Options, Inc. ("MOI") a listing of MOI's former customers who traded exchange traded options through MOI. Based on those records and my discussions with counsel for

MOI's receiver, I have estimated that there are approximately 28,000 customers names and addresses on the list.

I declare under penalty of perjury that the foregoing is true and correct and this declaration was executed this 10th day of August, 1993, at San Francisco, California.

\s\ Amy R. Gustafson
Amy R. Gustafson

APPENDIX U

Appellants' Reply to Appellees' Opposition to Appellants' Motion Pursuant to Federal Rule of Appellate Procedure 10(e) to Supplement the Record on Appeal, dated September 23, 1998

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 97-5074

WILLIAM WATERS and LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated,

Plaintiffs-Appellees,

-against-

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, Individually and as Trustee of the Jason Grosfeld Trust, MULTIVEST REAL ESTATE, INC., S. S. MELBOURNE, INC., and THE CYPRESS GROUP, INC.,

Defendants-Appellants.

APPELLANTS' REPLY TO APPELLEES' OPPOSITION TO APPELLANTS' MOTION PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 10(e) TO SUPPLEMENT THE RECORD ON APPEAL

Preliminary Statement

Plaintiffs-Appellees' Opposition to Defendants-Appellants' motion pursuant to Fed. R. App. P. 10(e) is an attempt to prevent defendants from presenting evidence to this Court proving that the district court erred in stating that defendants had supported plaintiffs' counsel's fee application in an off-the-record conference held on January 28, 1997. Defendants have submitted the affidavits of three respected members of the bar, Mr. Paul M. Dodyk of Cravath, Swaine &

Moore, Mr. R. Lawrence Bonner of Homer and Bonner and Mr. Martin I. Kaminsky of Pollack and Kaminsky, each of whom was present at the January 28 conference and each of them has sworn that defendants' counsel made no statement concerning plaintiffs' counsel fee at that conference. Plaintiffs' counsel know that no such statement was made because they were present at that conference. Plaintiffs' counsel has at no time filed any sworn statement or any other factual statement which, in any way, contradicts defendants' description of the January 28, 1997 conference, despite the fact that plaintiffs' counsel filed numerous pleadings relating to their fee application in the district court. Plaintiffs' Opposition to Defendants' 10(e) Motion ("Plaintiffs' Opposition") likewise artfully implies that defendants' counsel made such a statement, but stops short of saying so because they know that no such statement was made. (Plaintiffs' Opposition at 1)

The sole basis for Plaintiffs' Opposition is their untenable argument that this Court does not have the power under Fed. R. App. P. 10(e) to grant defendants' motion. Indeed, plaintiffs' counsel go so far as to assert that the district court alone is empowered to decide the question at issue and "that finding would be binding on this Court", thereby creating a unique category of error which cannot be reviewed on appeal. (Plaintiffs' Opposition at 2 (emphasis in the original)) None of the cases cited by plaintiffs supports plaintiffs' assertion.

Plaintiffs' argument is foreclosed by the clear and unambiguous text of Fed. R. App. P. 10(e) which states: "If anything material to either party is omitted from the record by error or accident or is misstated therein, . . . the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected . . . ." Fed. R. App. P. 10(e). Numerous courts have recognized that the courts of appeal have the power to supplement the record under Fed. R. App. P. 10(e) or by exercise of their inherent equitable powers. Young v. Augusta, 59 F.3d 1160, 1168 (11th Cir. 1995); Jones v. White, 992 F.2d 1548, 1566-68 (11th Cir.

1993); Cabalceta v. Standard Fruit Co., 883 F.2d 1553, 1555 (11th Cir. 1989); Turk v. United States, 429 F.2d 1327, 1329 (8th Cir. 1970); Barilla v. Ervin, 886 F.2d 1514, 1521 (9th Cir. 1989). Since any argument the plaintiffs may have is, thus, addressed to the discretion of this Court and since the subject of Defendants' 10(e) Motion is closely intertwined with the merits of this appeal, plaintiffs' suggestion that defendants' motion be decided by a motions panel is untenable.

Because the lower court's erroneous statements concerning the conference of January 28, 1997 appeared in the court's Final Order of May 8, 1997 which denied defendants' post-judgment motion pursuant to Fed. R. Civ. P. 52 and 59 (Exhibit A at 4),[7] defendants had no occasion or reason to litigate that issue before that court. Since the district court had obviously made its erroneous statements concerning the January 28, 1997 conference purposefully, there was no reasonable possibility that the court would reverse itself. On this appeal, defendants accept that the district court has said that defendants' counsel supported plaintiff', counsel's fee application at the January 28, 1997 conference. Defendants' counsel maintain and have sworn under oath that they made no such statement. Defendants are entitled to review of that position by the Court of Appeals and their right to review does not depend on their ability to first convince the district court that the statement, of which defendants seek review, was erroneous.

Statement of Facts

Because Plaintiffs' Opposition presents a materially misleading description of the proceedings below, defendants are constrained to submit a brief counter-statement.

---

[7] Citations to Exhibits herein refer to the Exhibits as attached to the accompanying Affidavit of Paul M. Dodyk, sworn to on September 23, 1998.

This appeal arises from the district court's abuse of discretion in awarding plaintiffs' counsel attorneys' fees and expenses of approximately $16,000,000 in a class action involving a class distribution of about $6,500,000. (Exhibit B)

Defendants' 10(e) Motion arises out of the district court's erroneous statement in its opinion of May 8, 1997, denying defendants' post-judgment motions pursuant to Fed. R. Civ. P. 52 and 59, that defendants' counsel supported the reasonableness of plaintiffs' fee application in an off-the-record conference initiated by the court on January 28, 1997. (Exhibit A at 4) The district court's statement is not supported by any evidence in the record. Plaintiff', counsel has at no time submitted any sworn pleading or other specific factual statement alleging the content of any such representation by defendants' counsel or contradicting the substance of the affidavits submitted pursuant to the Defendants' 10(e) Motion.

Indeed, plaintiffs' counsel never made any such assertion by way of argument until after the court had made its statement on May 8, 1997. Even in Plaintiffs' Opposition to Defendants' 10(e) Motion, plaintiffs' counsel do not attempt a factual contradiction of defendants' affidavits, limiting themselves to artful and disingenuous implication. ("These affidavits not only falsely characterize those proceedings . . . ." Plaintiffs' Opposition at 1) The reason they have not done so is that they know that no such representation was made because they were present at that conference.

Contrary to Plaintiffs' Opposition, defendants are not appealing anything they agreed to below and are not attacking the settlement stipulation. (Opposition at 1) The stipulation provided that plaintiffs' counsel would apply to the district court, which would set their fees under Fed. R. Civ. P. 23. Defendants did not agree to plaintiffs' counsel's fee. They agreed only that they "will not directly or indirectly oppose plaintiffs' class counsel of record's fee application". (Exhibit C at 55) As plaintiffs' counsel has admitted, the parties spent

"five months of grueling negotiations in every term of the documents . . . ." (Exhibit D at 8285) Defendants carefully defined what they agreed to. Defendants agreed to a process by which the district court would set plaintiffs' counsel's fee under Fed. R. Civ. P. 23 and within the limits of that court's lawful discretion. Defendants did not agree to grant plaintiffs' counsel any particular fee or to waive their right to appellate review of the district court's abuse of discretion. See Defendants' Brief on Appeal in Appeal No. 97-5074 ("Defendants' Brief") (Exhibit E at pp. 52-59)[8]

The facts underlying Defendant's 10(e) Motion occurred during the week of January 26, 1997. Plaintiffs' and defendants' counsel reached agreement on a complex settlement stipulation settling a commodities class action late in the evening of Sunday, January 26, 1997. Counsel announced the settlement to the court on the morning of Monday, January 27, 1997. During the week of January 26, 1997, the district court considered the reasonableness of the settlement and gave preliminary approval to the settlement on Friday, January 31, 1997. The district court did not consider or approve plaintiffs' counsel's fee application during that week. Rather, the court reserved ruling on plaintiffs' fee application until a later time, as is customary in the settlement of class actions. Plaintiffs' counsel did not even submit their fee application until February 20, 1997, and the court did not approve it until March 31, 1997.

Settlement counsel for the parties were summoned to the court on Tuesday, January 28, 1997. During that day, the district court initiated an off-the-record conference. The issue before this Court relates to whether defendants' counsel supported the reasonableness of plaintiffs' counsel's as yet unfiled fee application at that conference. Defendants seek to file, pursuant to Fed. R. App. P. 10(e), the affidavits of all three

---

[8] For the Court's convenience, defendants submit herewith a copy of their brief on appeal.

defense counsel who were present at that conference, affirming that no such statement was made. There is no evidence in the record to support the court's statement, which was set forth in an opinion filed three months later on May 8, 1997, denying defendants' post-judgment motion under Rules 52 and 59, that defendants' counsel made such a statement. Plaintiffs at no time filed any affidavit or other specific factual statement alleging that defendants had made such a statement. They made no such statement in their Fee Application which was filed on February 20, 1997. Most tellingly, they made no such statement in any of the numerous papers filed in the district court after February 20, 1997, dealing with plaintiffs' fee application, despite that fact that the application resulted in a protracted and rancorous dispute. (R32-1491; R32-1492; R33-1501; R33-1502; R33-1503; R33-1504; R33-1507; R33-1509; R33-1511; R33-1517; R34-1519; R34-1525; R34-1521; R34-1522; R34-1526; R34-1527; R34-1524; R34-1531; R34-1536; R34-1537; R35-1539; R35-1540; R35-1541)[9] It is inconceivable that plaintiffs' counsel would not have asserted that defendants' counsel had made the statement at issue on January 28, 1997 if such a statement had in fact been made. In fact, it never occurred to plaintiffs' counsel to suggest by way of argument that defendants' counsel had supported their fee application on January 28, 1997, until after the court made the statement at issue in its May 8, 1997 order.

The district court's statement that defendants' counsel made a statement supporting plaintiffs' counsel's fee application is not only without any support in the record; it is also wildly implausible. Plaintiffs' counsel would have this Court believe that defendants' counsel made such statements on January 28, 1997, to induce the district court to grant preliminary approval to the settlement and discharge the jury. That charge makes no sense.

---

[9] This citation is to the appellate record. Citations to the appellate record are denoted "R", followed by the volume number-docket number.

First of all, the only question to be decided by the court during the week of January 26, 1997, was the reasonableness of the settlement, not plaintiffs' counsel's fee, which was not even applied for until February 20, 1997. Plaintiffs' counsel had agreed to the settlement stipulation on January 26, 1997. When the conference with the court took place on January 28, 1997, they were bound. The only thing that defendants' counsel needed at that point was the court's approval of the reasonableness of the settlement. The district court's preliminary approval of the settlement was in no way dependent upon, nor could it have been favorably influenced by, any alleged support of plaintiffs' counsel's fee application by defendants' counsel. The settlement stipulation expressly provided that the settlement would not be affected in any way by the district court's fee decision. (Exhibit C at 58)

Second, any support by defendants' counsel of plaintiffs' expected fee application would have diminished the likelihood of the court's approval of the settlement. Under the terms of the settlement, the amount to be distributed to the class was reduced as plaintiffs' counsel's fee was increased.

On Monday, January 27, 1997, the district court expressed strong reservations about the settlement. The Court noted with disdain that the average class member would get a $1,200 note. (Exhibit D at 8291-92) The Court was aware that plaintiffs' counsel were seeking about $16,000,000 in fees and expenses, leaving only $24,000,000 of security for potential distributions to the class. (Exhibit D at 8267-68) The court knew that the proposed settlement was a reversionary settlement meaning that only a minority of the class members would file claims and receive any funds. (Exhibit D at 8274) As matters turned out, the settlement resulted in a total distribution of approximately $6,500,000 to the class in cash and notes. (Exhibit D to Defendants 10(e) Motion at 4.) The court went so far as to denounce plaintiffs' counsel's announced intention to seek the entire cash portion of the fund as "outrageous". (Exhibit D at 8292)

As a result of the district court's statements, it was doubtful that the settlement would be approved when settlement counsel appeared at the court on January 28, 1997. It was also clear that the court was dubious about the class payout and highly critical of plaintiffs' counsel's expected fee application. Under these circumstances, any support by defense counsel for plaintiffs' counsel's fee could have been the kiss of death.

Third, any statement by defendants' counsel in support of plaintiffs' fee application would have been contrary to their clients, financial interests, for the simple reason that defendants had to pay plaintiffs' counsel's fee. What possible reason could defendants' counsel have had to support an anticipated fee application which they believed to be grossly excessive?

Any statement by defendants' counsel in support of plaintiffs' counsel's fee would thus not only have been unnecessary to secure approval of the settlement; it would have been injurious to the prospects of approval and highly damaging to their clients, financial interests. No defense counsel of sound mind would have made any such statement.

The issue which gave rise to Defendants' 10(e) Motion did not arise until May 8, 1997, when the district court gratuitously inserted a statement that defendants' counsel had supported the reasonableness of plaintiffs' counsel's fee application in an order denying defendants' post-judgment application pursuant to Rules 52 and 59. In that motion, defendants pointed out that the district court's proposed Fee Award of $13,333,333 was over 200% of the projected class distribution while the highest fee award in the prior Eleventh Circuit cases the district court had relied upon was less than 50% of the class distribution. In Plaintiffs' Opposition, plaintiffs' counsel seek to give the misleading impression that defendants' counsel submitted an affidavit to the district court in support of their Rule 52 and 59 motion, describing the January 28, 1997 conference, which the district court rejected. (Opposition at 1, 5) That is false.

Defendants' affidavits in support of their Rule 52/59 motion did not address the January 28, 1997 meeting. More importantly, plaintiffs' counsel's opposition to defendants' Rule 52/59 motion did not claim that defendants' counsel had supported their fee application during the January 28, 1997 meeting. Indeed, at no time prior to the district court's order of May 8, 1997 did plaintiffs' counsel even argue that such a statement had been made. The reason they did not is, of course, that they knew that no such statement had been made. The district court simply inserted a statement stating that defendants' counsel had supported the reasonableness of plaintiffs' counsel's fee on January 28, 1997 in its order, entered over three months later on May 8, 1997, denying defendants' postjudgment motions under Fed. R. Civ. P. 52 and 59. That statement was inserted without any claim by plaintiffs' counsel that such a statement had been made or any opportunity for defendants' counsel to rebut any such claim. The statement was gratuitously inserted by the district court in its final order denying defendants' Rule 52 and 59 motion without any prior factual presentation by either party. Since the court's order of May 8, 1997 ruling on defendants' motion under Rules 52 and 59 concluded the district court proceedings with respect to the amount of plaintiffs' counsel's fee, defendants had no subsequent opportunity or reason to address that issue further below.[10]

By the time the court entered its May 8, 1997 order, it had become obvious to defendants' counsel that the trial court

---

[10] Contrary to plaintiffs' counsel's assertion, the district court did not claim that defendants' counsel had made any such statement during the April 25, 1997 hearing. Compare Plaintiffs' Opposition, p. 10, l.3 with Plaintiffs' Opposition Ex. C at 26. Similarly, the court's passing reference to the matter in the hearing of March 31, 1997 merited no response because that observation was irrelevant to the issue before the Court. At the March 31, 1997 hearing the district court purportedly exercised its own discretion to set plaintiffs' counsel fee under Fed. R. Civ. P. 23, albeit erroneously. It did not award a fee on the basis of the parties' agreement.

would brook no opposition to its determination to make its unprecedented and punitive Fee Award. The court had blatantly misconstrued applicable authority to ignore the amount of the actual class distribution in setting the fee. (See Exhibit E at 48-49) The court refused to acknowledge or consider the fact that its Fee Award, at 200% of the class distribution, was more than four times the highest fee award ever given in the earlier Eleventh Circuit precedents. (See Exhibit E at 49, 41-52) The district court had also misconstrued the clear-sailing provision of the settlement stipulation and had made it clear that it was enraged that defendants had the temerity to say anything at all during the proceedings leading to its unprecedented and exorbitant Fee Award. (Exhibit A at 7)

Under the circumstances, it was obvious that no purpose would be served by any further litigation before the district court concerning the events of January 28, 1997. There was no reasonable possibility that the court would alter its findings, however erroneous. Defendants had no recourse but to file their notice of appeal and seek appellate review of the district court's clearly erroneous rulings. While defendants strongly believe that the court erred in its May 8, 1997 order, defendants have not accused the district court of "lying" as plaintiffs' counsel recklessly charges. (Plaintiffs' Opposition at 6) Defendants have presented their position in the most carefully measured and respectful manner possible. It is plaintiffs' counsel who use the word "lying" in describing the district court's error in a desperate effort to prejudice this Court by their pejorative recharacterization of defendants' position.

Argument

Plaintiffs' counsel seek to deprive defendants of their right of appellate review. Like plaintiffs' counsel's two frivolous motions to dismiss this appeal, both of which have been denied as motions and carried to the merits panel, Plaintiffs' Opposition is baseless. (See Exhibits F and G)

Plaintiffs' counsel seeks to prevent this Court from considering defendants' position that the district court erred when it stated that defendants' counsel supported the reasonableness of plaintiffs' counsel's Fee Award in an off-the-record conference held on January 28, 1997. Indeed, plaintiffs' counsel goes so far as to say that defendants must make application to the district court and that the district court's "finding would be binding in this Court". (Plaintiffs' Opposition 2 (emphasis in the original)) Plaintiffs' counsel thereby asks this Court to accept the absurd position that this Court lacks the power to review erroneous findings by the district court where supplementation of the record is required.

Plaintiffs' counsel seeks to deprive defendants of appellate review despite the fact that they know no such statement was made. It is their knowledge of that fact which has prevented them from ever filing any sworn statement or any other specific factual statement alleging that defendants made such a statement at the January 28, 1997 conference. Knowing that the district court erred in making that statement, Plaintiffs' counsel nonetheless seek to perpetuate that error, claiming that defendants are barred from seeking appellate review of their position and that this Court is without the power to correct the district court's error.

The only argument advanced by plaintiffs' counsel is that this Court does not have the power to grant a motion to supplement the record pursuant to Fed. R. App. P. 10(e). That argument is foreclosed by the very language of Rule 10(e) which states: "If anything material to either party is omitted from the record by error or accident or is misstated therein, . . . the court of appeals, on proper suggestion or of its own initiative may direct that the omission or misstatement be corrected . . . ." Plaintiffs' counsel's argument is inconsistent with the plain language of the rule.

Numerous courts have held that a court of appeal may supplement the record where necessary either under Rule 10(e)

or by exercise of its inherent powers. Young v. Augusta, 59 F.3d 1160 (llth Cir. 1995); Jones v. White, 992 F.2d 1548, 1566-68 (llth Cir. 1993); Cabalceta v. Standard Fruit Co., 883 F.2d 1553, 1555 (llth Cir. 1989); Ross v. Kemp, 785 F.2d 1467, 1474 (llth Cir. 1986).

None of the cases cited by the plaintiffs says one word about an appellate court's power to direct supplementation of the record in appropriate circumstances. In Dupre v. Fru-Con Engineering, Inc., 112 F.3d 329 (8th Cir. 1997), the Court was dealing with a party's failure to make objections to jury instructions as required under Fed. R. Civ. P. 51. The court of appeals held only that it would not permit a litigant to avoid the requirements of Rule 51 by alleging compliance through an affidavit filed under Rule 10(e). The Court certainly did not say that a court of appeals lacks the power to grant a Rule 10(e) motion in appropriate circumstances.

Similarly, the court in *Thompson v. Johnson Count Community College*, 108 F.3d 1388 (10th Cir. 1997) held only that a party asserting that certain rulings had been made below should have caused the district court to make such rulings on the record prior to appeal. The Court said nothing that would cast doubt on the power of a circuit court to grant a motion under Rule 10(e). Indeed, the Court did not even mention Rule 10(e) since the motion was made under Fed. R. App. P. 10(c).

The First Circuit's opinion in Fisher v. Flynn, 598 F.2d 663, 666 n.5 (ist Cir. 1979), involved the mere suggestion by appellate counsel that "an oral motion to amend [a complaint] may have been made below." And the Tenth Circuit's opinion in Superior Mfg. Corip. v. Hessler Mfg. Co., 267 F.2d 302 (10th Cir. 1959), involved a claim that appellants, appeal was not barred because a certain referee's order allowed ten days for response rather than five reflected in the record. None of the cases cited by plaintiffs casts any doubt on the power of this Court to exercise the powers expressly granted by the text of

Fed. R. App. P. 10(e) in appropriate circumstances. Plaintiffs' argument simply has no basis in the rules or the cases.

Under the circumstances presented by this case, plaintiffs' counsel could, at best, ask this Court to exercise its discretion not to consider the affidavits filed under Rule 10(e). Any such ruling should be made by the merits panel because plaintiffs' motion is inextricably interwoven with the merits of the appeal. The statement at issue was inserted by the district court in its May 8, 1997 opinion without any factual showing to support that statement and after defendant's counsel had sought to demonstrate that the court was abusing its discretion. Informed evaluation of the district court's action in doing so requires consideration of the court's actions leading up to that ruling and defendants' contention that the district court been abusing its discretion in managing this litigation and in making its exorbitant and unprecedented Fee Award. Defendants' Rule 10(e) Motion thus presents issues which cannot be decided as abstract legal questions divorced from their factual context.

The facts below make a compelling case for exercise of this Court's powers under Rule 10(e). All of the cases relied upon by plaintiffs involved an attempt by counsel to be relieved from compliance with rules of procedure in the district court which were conditions to the relief sought on appeal, such as the requirement to object to jury instructions in Dupre. This is not such a case.

The district court's statement in this case was made in its final ruling on plaintiffs' counsel's fee application, denying defendants' post-judgment motion under Rules 52 and 59. The issue raised in this 10(e) motion is not whether defendants complied with some procedural requirement upon which their right to review is conditioned. Defendants'right to appeal cannot rationally be made dependent on whether the district court agrees that defendants did not make any statement concerning plaintiffs' counsel's fee on January 28, 1997.

Any application to the district court would have been futile. There is no realistic possibility that the district court would have reversed itself on that issue. Any such application would also have been pointless. What difference would it make to the parties, appellate positions if the defendants had filed their affidavits in the district court and the court had reaffirmed its statement?

On this appeal, defendants accept that the district court stated that they supported the reasonableness of plaintiffs' fee application on January 28, 1997. Defendants maintain that they did not and have submitted three sworn affidavits attesting to that fact. Defendants are entitled to this Court's review of their position and the district court's erroneous determination. Their right to that review does not depend on their ability to convince the district court that it was wrong. Any other rule would make it impossible for a litigant to obtain appellate review of clearly erroneous statements by the district courts involving off-the-record communications—plainly an absurd result.

Plaintiffs' Opposition is nothing more than one more attempt to deprive defendants of their right of appellate review by blatant misrepresentation of the rules and the case law. There simply is no authority supporting plaintiffs' argument that this Court lacks the power to grant a motion under Fed. R. App. P. 10(e). Plaintiffs' counsel seeks to deprive defendants of their right of appellate review of a district court's factual statement which they know to be in error. Plaintiffs' counsel offers this Court distortion of the law in an attempt to preserve a misstatement of fact for purposes of protecting their own

personal financial interests in an unprecedented and exorbitant Fee Award.

September 23, 1998

Respectfully submitted,

/s/ Paul M. Dodyk

Paul M. Dodyk
CRAVATH, SWAINE MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
Telephone: (212) 474-1000

R. Lawrence Bonner
HOMER & BONNER, P.A.
100 S.E. Second Street
Miami, FL 33131
Telephone: (305) 350-5100

Martin I. Kaminsky
POLLACK & KAMINSKY
114 West 47th Street
New York, NY 10036
Telephone: (212) 575-4700

Attorneys for Defendants-Appellants

APPENDIX V

Order Granting in part and Denying in Part Appellants' Motion to Supplement the Record on Appeal, and Granting Appellees' Motions to Strike Portions of Appellants' Brief and for Extension of Time, filed October 6, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-5074

WILLIAM WATERS;
LINDA BARTHOLOMEW, individually
and on behalf of all those similarly situated,

Plaintiffs-Appellees,

versus

INTERNATIONAL PRECIOUS METALS
CORPORATION; MULTIVEST; ET. AL.,

Defendants-Appellants.

On Appeal from the United States District Court for the
Southern District of Florida

ORDER:

Appellants' motion to supplement the record on appeal is GRANTED as to the document entitled "Declaration of Amy R. Gustafson in support of Plaintiffs' motion. . . ," but is otherwise DENIED.

Appellees' motion to strike portions of Appellants' brief is GRANTED. Appellants are ORDERED to file a corrected brief that deletes all references to documents that are not actually in the record on appeal. Appellants are ORDERED to

file that corrected brief within seven (7) days of the date of this order.

Appellees' motion to exceed this page limitation on their brief is GRANTED. Appellees may file a brief consisting of no more than sixty-five (65) pages.

Appellees' motion for an extension of time to file their brief is GRANTED. Appellees' are Ordered to file their brief within seven (7) days of the date Appellants serve their corrected brief.

Neither Appellants nor Appellees should ask for, nor expect to receive, further extensions of time to file the above-referenced briefs.

APPENDIX W

Brief for Defendants-Appellants,
dated October 16, 1998
(filed in the United States Court of
Appeals for the Eleventh Circuit)

No. 97-5074

IN THE

United States Court Of Appeals

FOR THE ELEVENTH CIRCUIT

WILLIAM WATERS AND LINDA BARTHOLOMEW,
INDIVIDUALLY AND ON BEHALF OF ALL THOSE SIMILARLY SITUATED,

Plaintiffs-Appellees,

v.

INTERNATIONAL PRECIOUS METALS CORPORATION,
MULTIVEST, INC., JAMES GROSFELD, INDIVIDUALLY AND AS
TRUSTEE OF THE JASON GROSFELD TRUST, MULTIVEST REAL ESTATE,
INC., S.S. MELBOURNE, INC., AND THE CYPRESS GROUP, INC.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR DEFENDANTS–APPELLANTS

Paul M. Dodyk
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
Telephone: (212) 474-1000
Facsimile: (212) 474-3700

R. Lawrence Bonner
HOMER & BONNER, P.A.
100 S.E. Second Street
Miami, FL 33131
Telephone: (305) 350-5100
Facsimile: (305) 379-0918

Martin I. Kaminsky
POLLACK & KAMINSKY
114 West 47th Street
New York, NY 10036
Telephone: (212) 575-4700
Facsimile: (212) 575-6560

Attorneys for
Defendants-Appellants

October 16, 1998

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with F.R.A.P. 28 and Eleventh Circuit Rules 26.1-1, 26.1-2, 26.1-3, and 28-2(b), undersigned counsel state that the following are interested persons and entities:

Gary S. Anderson (Counsel for Appellees/Plaintiffs)

Linda Bartholomew (Appellee/Plaintiff, Class Representative)

R. Lawrence Bonner (Counsel for Appellants/ Defendants)

Victor F. Caldwell (Counsel for Appellants/Defendants)

Justin Y.K. Chu (Counsel for Appellants/Defendants)

Certified Class of MultiVest Options, Inc. Customers (Appellees/Plaintiffs)

John L. Cooper (Counsel for Appellees/Plaintiffs)

Copart, Inc.

Cravath, Swaine & Moore (Counsel for Appellants/ Defendants)

The Cypress Group, Inc. (Appellant/Defendant)

Paul M. Dodyk (Counsel for Appellants/Defendants)

Farella Braun & Martel LLP (Counsel for Appellees/ Plaintiffs)

Neil A. Goteiner (Counsel for Appellees/Plaintiffs)

James Grosfeld, individually and as Trustee of the Jason Grosfeld Trust (Appellant/Defendant)

Nancy Grosfeld (Defendant in Conveyance Litigation below)

Homer & Bonner, P.A. (Counsel for Appellants/ Defendants)

Honigman, Miller, Schwartz & Cohn (Counsel for Corporate Defendants below)

International Precious Metals Corporation (Appellant/ Defendant)

Robert M. Jackson (Counsel for Corporate Defendants below)

Martin I. Kaminsky (Counsel for Appellants/ Defendants)

Karen P. Kimmey (Counsel for Appellees/Plaintiffs)

Jeffery R. Knight (Counsel for Appellants/Defendants)

Eric G. Lipoff (Counsel for Appellees/Plaintiffs)

James J. Mangan (Counsel for Appellants/Defendants)

Edward T. McDermott (Counsel for Appellants/ Defendants)

MultiVest, Inc. (Appellant/Defendant)

MultiVest Real Estate, Inc. (Appellant/Defendant)

Jeffrey P. Newman (Counsel for Appellees/Plaintiffs)

Pollack & Kaminsky (Counsel for Appellants/ Defendants)

L. Louis Raring (Counsel for Appellees/Plaintiffs)

Raring & Lipoff (Counsel for Appellees/Plaintiffs)

S.S. Melbourne, Inc. (Appellant/Defendant)

Michael R. Siebecker (Counsel for Appellants/ Defendants)

The Honorable Ursula Ungaro-Benages (Trial Judge below)

Steven C. Wasinger (Counsel for Corporate Defendants below)

William Waters (Appellee/Plaintiff, Class Representative)

C. Brandon Wisoff (Counsel for Appellees/Plaintiffs)

STATEMENT REGARDING ORAL ARGUMENT PURSUANT TO LOCAL RULE 28-2(c)

Counsel requests oral argument because of the complexity of the issues raised on appeal.

CERTIFICATE OF TYPE SIZE AND STYLE PURSUANT TO LOCAL RULE 28-2(d)

This brief has been typed in 11 point Times Roman font.

TABLE OF CONTENTS

	Page
STATEMENT REGARDING ORAL ARGUMENT PURSUANT TO LOCAL RULE 28-2(c)	iv
CERTIFICATE OF TYPE SIZE AND STYLE PURSUANT TO LOCAL RULE 28-2(d)	v
TABLE OF AUTHORITIES	xi
Statement of Jurisdiction	xviii
Statement of Issues on Appeal	1
Standard of Review	1
Statement of the Case	2
Nature of this Appeal and Disposition Below	2
Statement of Facts	5
1. The district court used this case to send a message to the securities industry condemning the sale of exchange traded options	12

Page

2. The district court improperly converted plaintiffs' churning claims into a financially ruinous class action by: (1) inventing a new federal cause of action in which liability was based on MOI's failure to disclose that it was engaged in an alleged fraudulent churning scheme; (2) eliminating the universally recognized reliance and transaction causation requirements from the Florida Securities Investor Protection Act; and (3) ignoring the defense of contributory negligence available under Florida law 14

3. Plaintiffs failed to offer any evidence of a scheme to defraud at trial 20

4. The district court's instructions failed to state an intelligible standard of culpable conduct 23

5. Defendants retain Cravath, Swaine & Moore to review their litigation position and negotiate a settlement 26

6. Plaintiffs' counsel make a nonnegotiable demand for a "clear-sailing" agreement .. 27

7. Plaintiffs and defendants negotiate a settlement which provides that plaintiffs' counsel will receive a nonassignable deferred obligation in partial payment of their fees 28

8. Plaintiffs and defendants negotiate a reversionary settlement 29

	Page
9. The district court grants preliminary approval to the settlement	32
10. Plaintiffs' counsel's fee application misrepresented the settlement as involving a "$40,000,000 recovery", provided no lodestar information and submitted one page in support of a request for $2,586,611 in expenses	36
11. Plaintiffs' counsel renege on their agreement with defendants by seeking to "revise" the settlement stipulation to make their deferred obligation fully assignable	38
12. The district court awards plaintiffs' counsel a fee which is over 200% of the actual class distribution and 400% of Eleventh Circuit precedent	39
SUMMARY OF ARGUMENT	41
ARGUMENT	45
I. THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING ITS WILDLY DISPARATE AND PUNITIVE FEE AWARD	45
A. The district court's fee award is an abuse of discretion because it is over 200% of the actual class distribution and over 400% of the highest Eleventh Circuit precedent	45

Page

B. Fee awards in reversionary settlements should be based on actual distributions to avoid conflicts of interest between plaintiffs' counsel and the class they represent 48

C. The district court's fee award is an abuse of discretion because: 52

(1) It is based on the court's erroneous interpretation of *Boeing v. Van Gemert*; 52

(2) It is based on the district court's wilful disregard of the actual distribution to the class; and 52

(3) It is based on the district court's misconception that this was a "well conceived class action" 52

II. DEFENDANTS' APPEAL IS NOT BARRED BY THE CLEAR-SAILING PROVISION 56

A. Defendants did not agree to remain silent in the face of plaintiffs' counsel's misrepresentations and the district court's abuse of discretion 56

B. Plaintiffs' counsel misrepresented the nature of the settlement 58

C. The district court abused its discretion in making the fee award and disregarding the actual class distribution 60

Page

D. Other circuit courts have held clear-sailing provisions unenforceable as contrary to public policy 61

E. Appellate review is necessary to protect the interests of the class against plaintiffs's counsel's misleading and exorbitant fee application 63

III. COUNSEL FOR PLAINTIFFS AND DEFENDANTS AGREED THAT PLAINTIFFS' COUNSEL WOULD TAKE A NONASSIGNABLE DEFERRED OBLIGATION 65

IV. THE DISTRICT COURT'S AWARD OF EXPENSES IS EXCESSIVE, UNREASONABLE AND NOT SUPPORTED BY ADEQUATE DOCUMENTATION 69

CONCLUSION 76

TABLE OF AUTHORITIES

CASES	Page(s)
Alna Capital Assocs. v. Wagner, 758 F.2d 562 (11th Cir. 1985)	17
Andrews v. American Tel. & Tel. Co., 95 F.3d 1014 (11th Cir. 1996)	15
Ashley v. Atlantic Richfield Co., 794 F.2d 128 (3d Cir. 1986)	28, 62
Boeing Co. v. Van Gemert, 444 U.S. 472 (1980)	40, 52, 53, 60
Bowling v. Pfizer, Inc., 927 F. Supp. 1036 (S.D. Ohio 1996)	47
Broussard v. Meineke Discount Muffler Shops, Inc., 1998 WL 512926 (4th Cir. August 19, 1998)	15
Butterworth v. Quick & Reilly, Inc., 998 F. Supp. 1404 (M.D. Fla. 1998)	17
Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996)	15
Central Bank of Denver, N.A., v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994)	10
City of Miami v. Bethel, 65 So. 2d 34 (Fla. 1953)	19
Clark v. Watchie, 513 F.2d 994 (9th Cir. 1975)	15
Cordis Corp. v. Sonics Int'l, Inc., 427 So. 2d 782 (Fla. Dist. Ct. App. 1983)	69

	Page(s)
Cowden v. Commissioner, 289 F.2d 20 (5th Cir. 1961)	66
Damato v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 878 F. Supp. 1156 (N.D. Ill. 1995)	10
Dean Witter Reynolds, Inc. v. Fernandez, 741 F.2d 355 (11th Cir. 1984)	63
deJesus v. Seaboard Coast Line R.R. Co., 281 So. 2d 198 (Fla. 1973)	19
Duhaime v. John Hancock Mut. Life Ins. Co., 989 F. Supp. 375 (D. Mass. 1997)	3, 47
E.F. Hutton & Co., Inc. v. Rousseff, 537 So. 2d 978 (Fla. 1989)	17
Evans v. Jeff D., 475 U.S. 717 (1986)	62
First Union Discount Brokerage Servs., Inc. v. Milos, 997 F.2d 835 (11th Cir. 1993)	17, 18, 19
Gilchrist Timber Co. v. ITT Rayonier, Inc., 95 F.3d 1033 (11th Cir. 1996)	18
Gilchrist Timber Co. v. ITT Rayonier, Inc., 696 So. 2d 334 (Fla. 1997)	18, 19
Gochnauer v. A.G. Edwards & Sons, Inc., 810 F.2d 1042 (11th Cir. 1987)	17
Goodrich v. E.F. Hutton Group, Inc., 1996 WL 76161 (Del. Ch. Feb. 2, 1996)	3, 47, 53
Hayden v. Paul, Weiss, Rifkind, Wharton & Garrison, 955 F. Supp. 248 (S.D.N.Y. 1997)	10
Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973)	19

	Page(s)
Hudson v. Delta Air Lines, Inc., 90 F.3d 451 (11th Cir. 1996)	15
In re "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1296 (E.D.N.Y. 1985), *aff'd in part, rev'd in part on other grounds*, 818 F.2d 226 (2d Cir. 1987)	70
In re American Honda Motor Co., Inc. Dealerships Relations Litig., 965 F. Supp. 716 (D. Md. 1997)	10
In re American Med. Sys., Inc., 75 F.3d 1069 (6th Cir. 1996)	15
In re Boesky Sec. Litig., 888 F. Supp. 551 (S.D.N.Y. 1995)	70
In re Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297 (N.D. Ga. 1993)	41, 47
In re Fleet/Norstar Sec. Litig., 974 F. Supp. 155 (D.R.I. 1997)	71
In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir. 1995)	62
In re Lake States Commodities, Inc., 936 F. Supp. 1461 (N.D. Ill. 1996)	10
In re Media Vision Tech. Sec. Litig., 913 F. Supp. 1362 (N.D. Cal. 1996)	71
In re Prudential Ins. Co. of Am. Sales Practices Litig., 962 F. Supp. 572 (D.N.J. 1997), *vacated in part on other grounds*, 1998 WL 409156 (3d. Cir. 1998)	47

Page(s)

In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995) 62

In re Sahlen & Assocs., Inc. Sec. Litig., 773 F. Supp. 342 (S.D. Fla. 1991) 17

In re Washington Pub. Power Supply Sys. Sec. Litig., 779 F. Supp. 1063 (D. Ariz. 1990), *vacated in part on other grounds*, 19 F.3d 1291 (9th Cir. 1994) 70

Jankovich v. Bowen, 844 F. Supp. 743 (S.D. Fla. 1994) 17

Kaser v. Swann, 141 F.R.D. 337 (M.D. Fla. 1991) 15

Kashner Davidson Sec. Corp. v. Desrosiers, 689 So. 2d 1106 (Fla. Dist. Ct. App. 1997) 17

Kolbeck v. LIT Am., Inc., 923 F. Supp. 557 (S.D.N.Y. 1996) 10

Lachance v. Harrington, 965 F. Supp. 630 (E.D. Pa. 1997) 71, 72

Lamb v. Sears, Roebuck & Co., 1 F.3d 1184 (11th Cir. 1993) 17

Lance v. Wade, 457 So. 2d 1008 (Fla. 1984) . 15

Lyons v. Scitex Corp., 987 F. Supp. 271 (S.D.N.Y. 1997) 3, 46

Malchman v. Davis, 761 F.2d 893 (2d Cir. 1985) 62

Martin v. Heinold Commodities, Inc., 643 N.E. 2d 734 (Ill. Sup. Ct. 1994) 20

	Page(s)
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982)	6
Moore v. St. Cloud Utils., 337 So. 2d 982 (Fla. Dist. Ct. App. 1976)	19
Morganstein v. Esber, 768 F. Supp. 725 (C.D. Cal. 1991)	73
Moscarelli v. Stamm, 288 F. Supp. 453 (E.D.N.Y. 1968)	15
Newburger, Loeb & Co., Inc. v. Gross, 563 F.2d 1057 (2d Cir. 1977)	14
Pozzi v. Smith, 952 F. Supp. 218 (E.D. Pa. 1997)	72
Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977)	28, 62
Purdy v. Security Sav. & Loan Ass'n, 727 F. Supp. 1266 (E.D. Wisc. 1989)	70
Retired Chicago Police Ass'n v. City of Chicago, 7 F.3d 584 (7th Cir. 1993)	15
Rolo v. City Investing Co. Liquidating Trust, Nos. 95-5768, 96-5128, 1998 WL 547050 (3d Cir. August 31, 1998)	10
Schiavone Const. Co. v. City of New York, 94 Civ. 1153, 1995 WL 714339 (S.D.N.Y. Dec. 5, 1995)	69
Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 482 F.2d 880 (5th Cir. 1973) ..	15
Smith v. Sade & Co., No. 81-2628, 1982 WL 1341 (D.D.C. Oct. 27, 1982)	6

	Page(s)
Spicer v. Chicago Bd. Options Exch., Inc., 844 F. Supp. 1226 (N.D. Ill. 1993)	70
Sprague v. General Motors Corp., 133 F.3d 388 (6th Cir. 1998)	15
Stevens v. Woodstock, Inc., 372 F. Supp. 654 (N.D. Ill. 1974)	15
Strong v. BellSouth Telecomm., Inc., 137 F.3d 844 (5th Cir. 1998)	3, 31, 47, 53, 63
Thompson v. Smith Barney, Harris, Upham Co. Inc., 709 F.2d 1413 (11th Cir. 1983)	9, 11, 14
Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248 (4th Cir. 1971)	63
Waters v. International Precious Metals Corp., 172 F.R.D. 479 (S.D. Fla. 1996)	8, 10, 11, 13, 14, 16, 17, 64
Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518 (1st Cir. 1991)	61
Westlake v. Abrams, 575 F. Supp. 58 (N.D. Ga. 1983)	15
Whigham v. Muehl, 500 So. 2d 1374 (Fla. Dist. Ct. App. 1987)	17
Williams v. MGM-Pathe Comm. Co., 129 F.3d 1026 (9th Cir. 1997)	47
Wise v. Popoff, 835 F. Supp. 977 (E.D. Mich. 1993)	3, 46, 53

Page(s)

STATUTES AND RULES

The Commodity Exchange Act, 7 U.S.C. §§ 4c(b), 13(a) and 22, as amended, 7 U.S.C. § 6c(b), 13c(a) and 25 9

18 U.S.C. §§ 1962 (a), (c), (d) 9

15 U.S.C. § 77z-1(a)(6) 46

28 U.S.C. § 1291 xviii

17 C.F.R. 1.1 at § 1.55 (1978) 7

17 C.F.R. § 240.10(b)5 9

46 Fed. Reg. 54500 (1981) 6

The Florida Securities and Investor Protection Act (SIPA), Fla. Stat. § 517.301 ..... 9, 16, 17, 18

Fed. R. App. P. 10(e) xviii

Fed. R. Civ. P. 23 ..... 34, 63

Fed. R. Civ. P. 52(b) xviii

Fed. R. Civ. P. 59(e) xviii

U.C.C. § 9-104(f) 68, 69

MISCELLANEOUS

Denise N. Martin *et al.*, National Economic Research Associates, Inc., *Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions?* (1996) 2

Gertzman, Federal Tax Accounting, § 3.03[1][d][v] at 3-21 66

Statement of Jurisdiction

Defendants appeal pursuant to 28 U.S.C. § 1291 from a final order and judgment entered on April 8, 1997, (R33-1516)[1] as amended by the Amendment to Final Order and Judgment Approving Settlement entered on May 16, 1997 (R35-1543) awarding plaintiffs' counsel fees and expenses of $15,733,537.77, in a securities class action in which approximately $6,450,000[2] will be distributed to the class, and from the district court's orders entered May 16, 1997 denying defendants' motions pursuant to Federal Rules of Civil Procedure 52(b) and 59(e) (R35-1544; R35-1542). Defendants filed their notice of appeal on June 6, 1997. (R35-1547).

---

[1] Citations to the appellate record are denoted "R", followed by the volume number-exhibit number at page number (if any). Citations to Trial Exhibits are denoted as PX, for Plaintiffs' trial exhibits, and DX, for Defendants' trial exhibits, followed by the exhibit number at page number (if any). Citation to the Declaration of Amy R. Gustafson, Esq., dated August 10, 1993, is referenced *infra* as "RS-E", which is Exhibit E to the Motion of Defendants-Appellants Pursuant to Fed. R. Civ. P. 10(e) to Supplement the Record on Appeal, dated September 9, 1998. That motion was granted with respect to the Gustafson Declaration by Order filed October 6, 1998.

[2] The amount of actual distributions to the class was estimated by the Settlement Administrator at $6,485,362 in its Revised Initial Distribution Report. (R35-1563 at 13) For purposes of simplicity, defendants use $6,450,000 as an accurate estimate of the actual distribution to be made to the class and rely on R35-1563 at 13 as the record reference.

Statement of Issues on Appeal

1. Whether the district court's orders awarding fees to plaintiffs' counsel, which are over 200% of the amount to be distributed to the class and more than 400% of the amounts, relative to the class distributions, heretofore awarded by the courts of the Eleventh Circuit, should be reversed as an error of law and an abuse of discretion?

2. Whether this appeal is barred by a clear-sailing provision set forth in the Stipulation of Settlement where Appellants seek review of the district court's abuse of discretion based on plaintiffs' counsel's misrepresentations of fact and failure to comply with basic requirements for the proof of fees and expenses?

3. Whether the district court's order holding that a deferred obligation to be taken in partial payment of plaintiffs' counsel's fee award is assignable constitutes reversible error?

4. Whether the district court erred in approving 90% of plaintiffs' counsel's requested expenses when counsel failed to produce invoices, failed to show that the expenses were necessary for prosecution of the case and claimed nonreimbursable expenses?

Standard of Review

The standard of review for issues (1) and (4) is abuse of discretion. The standard of review for issues (2) and (3) is de novo since these issues involve questions of law and construction of the Settlement Stipulation.

Statement of the Case

Nature of this Appeal and Disposition Below.

Defendants appeal from three orders of the district court entered during post-settlement proceedings in this securities/commodities class action. The issues raised on appeal relate to the fees and expenses awarded to plaintiffs' class counsel. The court's order of March 25, 1997 granted plaintiffs' counsel's application seeking to "revise" the settlement documents to make a deferred obligation, to be taken by plaintiffs' counsel in partial payment of their fee, assignable. (R33-1515 at 3-5; R32-1482 at 4 n. 4) The court's order of April 8, 1997, as amended by its May 16, 1997 orders, awarded plaintiffs' counsel fees of $13,333,333 ("Fee Award") and expenses of $2,400,204 despite the fact that only $6,450,000 will be distributed to the class. (R33-1516; R35-1542; R35-1543; R35-1544)[3] The Fee Award is more than 200% of the total amount to be distributed to class members. The district court based its Fee Award on the fees awarded in 29 earlier securities class action cases in this Circuit which were the subject of a study by the National Economic Research Associates (the "NERA Study").[4] The average attorneys' fee in those cases was 29.92% of the total settlement amounts. (R132-1518 at 87; R32-1481 at Ex A, Table 12b) In no case did the fees awarded exceed 50% of the amount *actually distributed* to

---

[3] Defendants use $6,450,000 as an accurate estimate of the actual distribution to be made to authorized claimants as described in note 2. There are about 1,250 disputed claimants who did not timely file their Monthly Statements and 250 disputed claimants who did not timely file their Proofs of Claim whose claims are the subject of Appeal Nos. 97-5862 and 98-4251. The claims of the disputed claimants are estimated as being approximately $1,900,000. (R35-1555 at Ex. A (Settlement Administrator's letter, dated September 8, 1997))

[4] Denise N. Martin *et al.*, National Economic Research Associates, Inc., *Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions?* (Nov. 1996). (R32-1481, Ex. A at Table 12b)

class members. (R34-1528 at ¶ 15) As a result, the Fee Award in this case is approximately four times (or 400%) the highest fee heretofore awarded in this Circuit relative to the actual distributions in those cases.

When defendants attempted to point out this disparity, the district court simply refused to consider it. (R132-1518 at 81-94) The court's disregard of the actual class distributions as the primary determinant of fee awards is an abuse of discretion. Federal courts do not even have the power to award fees in excess of a reasonable percentage of the actual distributions in currently filed securities actions. The *Private Securities Litigation Reform Act* ("PSLRA") so provides: "Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class *shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class*." 15 U.S.C. § 77z-1(a)(6) (emphasis supplied).

The only case cited to the district court which dealt with the significance of actual class distributions held that the amount of the *actual* distribution was controlling, not the nominal amount of the "settlement fund". *See Wise v. Popoff*, 835 F. Supp. 977, 982 (E.D. Mich. 1993) ("the Court determines that *a more reasonable fee results from calculating a percentage of the actual recovery*") (emphasis supplied). Virtually all courts that have considered the issue have reached the same conclusion. *See Strong v. BellSouth Telecomm., Inc.*, 137 F.3d 844, 851-52 (5th Cir. 1998); *Lyons v. Scitex Corp.*, 987 F. Supp. 271, 279 (S.D.N.Y. 1997); *Goodrich v. E. F. Hutton Group, Inc.*, No. 8279, 1996 WL 76161, at *3 (Del. Ch. Feb. 2, 1996); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 989 F. Supp. 375, 378-79 (D. Mass. 1997).

The Fee Award constitutes an abuse of discretion both in its result and in its process. That Fee Award, at over 200% of the amount actually distributed to the class, is more than four times the highest fee award in the 29 Eleventh Circuit cases

studied by NERA. In making this Fee Award, the district court did not rely upon the benefit conferred upon the class, which it found unremarkable. (R132-1518 at 90-92) Nor did the court rely upon any lodestar demonstration because no such showing was made. (R132-1518 at 88) Instead, the district court justified its Fee Award as a reward for plaintiffs' counsel's prosecution of a "well-conceived class action". (R132-1518 at 85)

This case should never have been allowed to proceed as a class action. The claims underlying this case are essentially churning claims in nondiscretionary accounts. In such accounts, the broker has no authority to trade without specific authorization from the client. That practice has never before been certified as a class action because such churning claims turn on proof of individual communications between a securities purchaser and his or her broker.

The district court converted these claims into a class action by suspending the applicable rules of law. *First*, the court invented a new cause of action which made the mere failure to disclose defendants' Alleged Scheme to Churn—instead of actual churning—the basis for liability. *Second*, the court eliminated the universally recognized requirements of reliance and transaction causation in direct contradiction of controlling precedents. *Third*, the court adopted a measure of damages which permitted all plaintiffs to recover all of their investment losses whether or not they had been affected by the alleged churning—an amount equal to $120,000,000 plus prejudgment interest of $100,000,000. The end result was that all class members, who purchased commodity options at market-determined prices and fully disclosed commissions through nondiscretionary accounts, and who experienced the same gain or loss as anyone who bought the same option at the same price and commission from any other broker, were allowed to recover their entire investment losses over a five-year period, without any proof that any plaintiff's purchase was actually *caused* by the alleged churning. The court's rulings allowed plaintiffs who made their own investment decisions without

any broker recommendations, and those who had honest brokers to recoup all of their investment losses.

The district court then forced its contrived cause of action through a five-month trial which plaintiffs' counsel abruptly settled as the case was about to go to the jury for a small fraction of the $90,000,000 they had adamantly demanded throughout this seven-year litigation; *i.e.*, $6,450,000 in actual class distributions. The district court then proceeded to impose a clearly punitive Fee Award. Because the district court justified its abuse of discretion in granting the exorbitant and unprecedented Fee Award as a reward for plaintiffs' counsel's "well-conceived class action", it is necessary to review the court's rulings in some detail. (R132-1518 at 85)

Defendants request that this Court redetermine the fee payable to plaintiffs' counsel de novo in accordance with the applicable law. If the Court determines that remand is necessary, defendants respectfully request that the case be remanded to a different judge. As shown below, the district court's abuse of discretion in imposing a clearly punitive Fee Award arose out if its misguided determination to punish defendants for the sale of perfectly legal commodity options — a determination which drove the court to conscious disregard of binding precedent. Under these circumstances, it is too much to expect that the district court will be able to reconsider its Fee Award free of the misconceptions which resulted in its abuse of discretion.

Statement of Facts

This case arises out of plaintiffs' decisions to purchase options on futures contracts known as Exchange Traded Options ("ETOs") through nondiscretionary accounts (R82-1396 at 1129-30) at MultiVest Options Inc. ("MOI"). (R1-47 at 2-4, 6) ETOs are an investment vehicle introduced in the early 1980s which gives the option buyer the right to buy or

sell a particular futures contract at a stated price at any time prior to a specified date. 46 Fed. Reg. 54500 (1981). (DX 993) The price paid for an option or "premium" is established through open competition between buyers and sellers on the trading floor of regulated futures exchanges. (DX 993 at 5)

ETOs enable investors to make highly-leveraged, limited-risk investments; that is, the premiums are a small fraction of the values of the underlying commodities and losses are limited to the premiums and commissions paid. (*Id.* at 2) The leverage provided by ETOs offers the prospect of very large returns relative to the premiums. (DX 37 at 3) ETOs have value only for their stated duration and ETO investors can profit only if there are favorable price fluctuations during their term. (DX 993 at 7-8)

ETOs are traded on most of the national exchanges and are sold by major brokerage houses. *See Smith v. Sade & Co.*, No. 81-2628, 1982 WL 1341, at *8 (D.D.C. Oct. 27, 1982). Federal laws have recognized the importance of commodity futures, such as ETOs, as hedges against future commodity price fluctuations. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 357-61, 102 S. Ct. 1825, 1828-31 (1982). While ETOs are perfectly legal investments, their limited life makes them highly speculative.

MOI is an indirect wholly-owned subsidiary of MultiVest Inc. (R90-1404 at 2934) MultiVest Inc. had numerous subsidiaries that were primarily in the real estate business. During the class period one of those subsidiaries, MultiVest Real Estate, Inc. managed investments for 12,000 limited partners valued at over $100,000,000. (R90-1404 at 2912) MOI was an established firm which offered ETOs to the investing public shortly after ETOs were authorized by the Commodity Futures Trading Commission ("CFTC"). MOI was duly registered by the CFTC and the National Futures Association ("NFA"). MOI's brokers were all duly licensed. MOI had offices in Florida and California, hundreds of employees,

thousands of customers, and millions of dollars in revenue. (R1-47 at 2-3)

All of MOI's customers had nondiscretionary accounts—each customer authorized each purchase or sale. (R82-1396 at 1129-30) Some of MOI's customers decided what ETO they wished to purchase or sell and ordered the MOI broker to execute the trade. (R108-1422 at 5795) Others received recommendations before they decided what to do. (R112-1426 at 6720-22)

In accordance with CFTC rules, MOI distributed a CFTC-mandated risk disclosure statement (in which the CFTC sets forth the exact language which must be used to disclose the risk) to all of its customers prior to purchasing any ETO positions. CFTC Risk Disclosure Statement 17 C.F.R. 1.1 at § 1.55 (1978). (DX 37 at 19) In addition to the CFTC risk disclosure statement, MOI also voluntarily distributed an even more cautionary statement which warned customers that ETOs were highly risky and that MOI's commissions[5] were higher than those charged by many of MOI's competitors. (DX 330)

MOI maintained a compliance department which reviewed and approved all customer accounts and set investment limits for each customer. (R82-1396 at 1119, 1328-1330) Many accounts were rejected by the compliance department if the customer did not have sufficient risk capital or appreciation of the risks involved. (R115-1428 at 7327) The compliance

---

[5] MOI's commissions were fully disclosed at the time of the purchase of the ETO and were generally 25% of the option premium on purchase and zero on sale. (DX 37 at 39) MOI's commissions were slightly over 1% of the value of the commodity underlying the option purchased. A movement of slightly over 1% in the price of the commodity (over the strike price) would recoup the commission and a movement of slightly over 6% would recoup the premium and the commission. A movement of 14% allowed the purchaser to double his or her investment. MOI also disclosed the fact that its commissions may be higher than those charged by certain other firms. (DX 37 at 18)

department initiated contact with hundreds of customers to determine if any problems existed. (R80-1394 at 761)

In 1988 the NFA brought a Business Conduct Committee complaint against MOI and ten individual brokers. (PX 380) Of the 10 brokers named, 6 had been terminated by MOI before the complaint was filed. (R97-1411 at 3980) No member of MOI's management was named. MOI settled the complaint, without admitting or denying liability, by paying a fine of $90,000. (PX 388) In January 1990 (after the class period) the CFTC brought an action against MOI alleging fraud by unspecified MOI brokers in offering ETOs to customers. (PX 906) No brokers were named, nor were any members of management.

For over a year prior to the filing of the CFTC complaint, MOI's revenues had declined. (R90-1404 at 2961-2962) MOI incurred substantial losses in 1989. A decision was made in 1989 to close the company if losses continued. (*Id.* at 2965-2966) The filing of the CFTC complaint in 1990 proved to be the final straw. (*Id.* at 2966) The decision was made to settle with the CFTC and close the company, over the vigorous objections of management who wanted to fight the CFTC complaint and buy the company. (*Id.* at 2961; R91-1405 at 3096, 3125) The CFTC complaint was settled without admitting or denying any liability. (R90-1404 at 2969)

Almost immediately after the settlement of the CFTC action, plaintiffs brought this class action. Plaintiffs' complaint alleges what are essentially churning claims. *Waters v. International Precious Metals Corp.*, 172 F.R.D. 479, 483 (S.D. Fla. 1996). As the district court put it:

> Plaintiffs allege that Defendants were engaged in a scheme to defraud MOI's customers by soliciting and stimulating excessive trading in commodities options by the customers without regard to the customers'

interests for the fraudulent purpose of maximizing commissions ("The Alleged Scheme to Churn"). *Id.*[6]

Plaintiffs asserted their claims as violations of (1) Sections 4c(b), 13(a) and 22 of the Commodity Exchange Act ("CEA"), as amended, 7 U.S.C. §§ 6c(b), 13c(a) and 25; (2) the Florida Securities and Investor Protection Act ("SIPA"), Fla. Stat. §§ 517.301 (which is patterned after Federal Rule 10b-5, 17 C.F.R. § 240.10b-5); (3) the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(a), (c) and (d); and (4) the Florida common law of fraud, negligent misrepresentation, contract and fiduciary duty. (R1-47 at 1-2, 56-79)

Plaintiffs' counsel chose not to sue MOI or the brokers who allegedly churned. Plaintiffs' counsel chose to sue Mr. James Grosfeld because Mr. Grosfeld, as the owner of MOI's parent corporation, was the only deep pocket available to fund plaintiffs' counsel's financial aspirations.

Mr. Grosfeld is a prominent Michigan businessman and philanthropist who was during the class period the Chairman and CEO of Pulte Corporation, a Standard & Poors 500 company, and the largest home builder in the United States. (R14-598, Declaration of James Grosfeld at 4) He is a graduate of Amherst College and the Columbia Law School. (R89-1403 at 2696-97) Apart from this unfortunate situation, Mr. Grosfeld has never been sued during the course of a business career spanning some thirty-five years. Mr. Grosfeld was not named as a party in either the NFA or CFTC actions. (R14-598 at 3; PX 380, 906) Mr. Grosfeld was never an officer or director of MOI or its parent company, MultiVest Inc. Indeed, he visited MOI's main office in Florida only two times during the five-

---

[6] Compare this Court's definition of churning: "Churning occurs when a securities broker buys and sells securities for a customer's account, without regard to the customer's investment interests, for the purpose of generating commissions." *Thompson v. Smith Barney, Harris, Upham Co. Inc.*, 709 F.2d 1413, 1416 (11th Cir. 1983.)

year class period. (R90-1404 at 2923-24) Mr. Grosfeld received compensation only from MOI's parent corporation, MultiVest Inc. in the form of a consulting agreement that paid him between $1.5 and $2 million dollars over the five-year class period (PX 141; R90-1404 at 2917-18) Plaintiffs' counsel sued Mr. Grosfeld only by asserting vicarious liability against him as owner of MOI's parent corporation under the Florida SIPA and by virtue of the district court's erroneous "aider and abettor" rulings under the CEA and RICO. *Waters*, 172 F.R.D. at 491, 493.[7]

---

[7] Liability under RICO is foreclosed by *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, in which the Supreme Court held that liability under § 10(b) of the Securities and Exchange Act does not extend to mere aiders and abettors: "[W]hen Congress enacts a statute under which a person may sue and recover damages from a private defendant . . . there is no general presumption that the plaintiff may also sue aiders and abettors". *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 182, 114 S. Ct. 1439, 1450-51 (1994). The federal courts have applied *Central Bank's* reasoning to preclude private civil aiding and abetting liability under the RICO statute. *See, e.g., Rolo v. City Investing Co. Liquidating Trust*, 1998 WL 547050, at *11 (3d Cir. August 31, 1998) ("[W]e are convinced that a private cause of action for aiding and abetting a RICO violation cannot survive the Supreme Court's decision in [Central Bank]"); *In re American Honda Motor Co., Inc. Dealerships Relations Litig.*, 965 F. Supp. 716, 723 (D. Md. 1997); *Hayden v. Paul, Weiss, Rifkind, Wharton & Garrison*, 955 F. Supp. 248, 255-57 (S.D.N.Y. 1997); *In re Lake States Commodities, Inc.*, 936 F. Supp. 1461, 1475 (N.D. Ill. 1996).

The district court also erred in failing to dismiss plaintiffs' aiding and abetting claim under the CEA. Section 25(a) provides the exclusive private right of action available under that statute. *In re Lake States*, 936 F. Supp. at 1467-68. In order to assert an aider and abettor claim under the CEA, plaintiffs must satisfy one of the four "conditions precedent" listed in § 25(a)(1)(A)-(D), all of which require the defendant's personal participation in the transaction attacked. *Kolbeck v. LIT Am., Inc.*, 923 F. Supp. 557, 566 (S.D.N.Y. 1996). Because the plaintiffs did not allege that Mr. Grosfeld so participated, they failed to state an aiding and abetting claim under the CEA. *See Damato v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 878 F. Supp. 1156, 1161 (N.D. Ill. 1995).

Plaintiffs do not allege that MOI failed to charge the relevant market-determined premiums for the ETOs they sold or that MOI misrepresented the commissions charged. Plaintiffs do not allege that there was anything about the ETOs which made them fraudulent or otherwise actionable. Indeed, all plaintiffs received exactly what they bargained for—the right to purchase a commodity futures contract for a market-determined premium and a fully disclosed commission. This is not a "fraud on the market" case. Plaintiffs' only claim is that *some* MOI brokers encouraged excessive trading without regard for the customers' interests. *See Waters*, 172 F.R.D. at 483. *Compare Thompson v. Smith Barney, Harris, Upham Co. Inc.*, 709 F.2d 1413, 1416 (11th Cir. 1983).

In an effort to prejudice the trial court, the jury and now even this Court, plaintiffs' counsel has repeatedly called MOI a telemarketing boiler room. (R1-47 at 65) This pejorative term conjures visions of unlicensed brokerage operations operating out of a basement "boiler room" and selling worthless securities by cold-calling prospective customers in violation of state and federal law. The term does not apply to the conduct alleged in this case. MOI and its brokers were duly licensed. Plaintiffs do not allege that the ETOs were in any sense worthless, fraudulent or otherwise actionable. MOI never cold-called its customers, all of whom initiated contact with MOI after hearing of MOI through an advertisement or some other source. (R109-1423 at 6077)

All of plaintiffs' accounts were nondiscretionary. That means that the customer had to authorize each trade. Some MOI customers received no broker recommendations and used MOI only to execute trades. Others had honest brokers. Others had brokers who allegedly attempted to churn their accounts and may or may not have acted on those brokers' recommendations.

In a nondiscretionary account, churning can be accomplished only through communications, invariably oral,

between an individual customer and his or her broker. To prove churning, a plaintiff must prove that his or her broker caused excessive trading by some fraudulent communications. It is that requirement which has prevented any court, other than the court below, from certifying a class action in such a case. Through a series of clearly erroneous rulings described below, the court in this case certified a class action in a churning case involving over 20,000 class members who dealt with some 800+ MOI brokers (R114-1439 at 7200; PX 1583) and executed over 150,000 trades over a five-year period from June 1985 to October 1989. (PX 100)

1. The district court used this case to send a message to the securities industry condemning the sale of exchange traded options.

Despite the fact that ETOs are perfectly legal commodities which are widely traded on national exchanges and subject to federal regulation through the CFTC, the district court decided they should be outlawed: ". . . I don't know that a broker can ethically sell ETOs or even legally sell ETOs . . . . I don't see how these things can be sold legally". (R100-1414 at 4275) The court expressed its annoyance that the Federal Government permitted the sale of ETOs: "The CFTC and, I guess, Congress have obviously made a decision that these investment vehicles . . . can be marketed to the general public." (R100-1414 at 4259, 4275) "To me, that is completely illogical, irrational, and what it reflects in my mind is a complete regulatory pass the buck." (R100-1414 at 4260) The court was undeterred by the fact that Congress had sanctioned the trading of ETOs and the CFTC had promulgated risk disclosures which they believed adequate.

The court made clear that disclosure was not, in its view, a remedy: ". . . I don't know that there is a way to inform the general investing public of what the true risks of dealing in ETOs is on a meaningful level". (R100-1414 at 4344) "So what

arose in my mind was a question as to how could these things ever be sold?" (R101-1415 at 4642) The court at one point described the sale of ETOs as "a crooked crap game", and later concluded "... *were it up to me, I would outlaw them*". *Waters*, 172 F.R.D. at 489. (R100-1414 at 4275 (emphasis added)) As will be seen, that is exactly what the court did.

The district court failed to understand that some investors choose to invest some funds in speculative securities which offer large potential rewards for limited premiums even though they normally produce losses. For example, class representative Waters is a successful businessman who owned a contracting business and had a net worth in excess of $1,500,000. (PX 265A) He maintained an account at MOI for 18 months. (PX 274, 275) His account enjoyed many profitable trades. Ultimately, Mr. Waters' strategy did not prove successful and he lost some $80,000 over the period. (PX 274, 275) Significantly, plaintiffs' counsel chose not to call Mr. Waters or any class member at trial. As that strategy reveals, this was most definitely not a "widows and orphans" case. The average alleged loss by plaintiffs of $6,000 constitutes less than 3% of their average net worth. (R101-1415 at 4621) Any customer who felt aggrieved could resort to a customer-friendly arbitration process sponsored by the NFA and CFTC (R86-1400 at 2158; R13-1427 at 6908).

The court's instrument for carrying its message of condemnation was to pressure defendants into a settlement. As the court put it: "... [W]e have done a lot of stuff in this case to see whether or not the nut would crack, and the nut doesn't seem to crack in this case". (R56-616 at 237) The court pursued its efforts by issuing a series of plainly erroneous and highly prejudicial rulings which raised the specter of bankrupting Mr. Grosfeld. The court later sought to send its message through a clearly punitive Fee Award.

2. The district court improperly converted plaintiffs' churning claims into a financially ruinous class action by: (1) inventing a new federal cause of action in which liability was based on MOI's failure to disclose that it was engaged in an alleged fraudulent churning scheme; (2) eliminating the universally recognized reliance and transaction causation requirements from the Florida Securities Investor Protection Act; and (3) ignoring the defense of contributory negligence available under Florida law.

The principal factor frustrating the court's desire to send a message condemning ETOs was the individualized nature of the alleged churning which supposedly affected a class of 20,000 customers who had ordered over 150,000 trades in a variety of ETOs over a five-year period. (PX 100) Having alleged that MOI stimulated excessive trading "for the fraudulent purpose of maximizing commissions", *Waters*, 172 F.R.D. at 483, each plaintiff was required under the law to prove the basic elements of a churning claim, *i.e.*, that "(1) the trading in his account was excessive in light of his investment objectives; (2) the broker in question exercised control over the trading in the account; and (3) the broker acted with the intent to defraud or with willful and reckless disregard for the investor's interest". *Thompson*, 709 F.2d at 1416-17.

In nondiscretionary accounts, such proof requires evidence of the communications through which control was exerted. *See, e.g., Newburger, Loeb & Co., Inc. v. Gross*, 563 F.2d 1057, 1069-70 (2d Cir. 1977). In such a situation, three general outcomes are possible: (1) the broker may make no recommendation; (2) the broker may be honest; or (3) the broker may make fraudulent recommendations, which may or may not be acted upon. In the first two cases, there is obviously no basis for liability. In the third, there may be liability, but that can be established only by proving that a broker made

actionable misrepresentations which caused a customer to engage in trading which resulted in a loss.

It is because of the individualized proof necessary to establish churning that no other court had ever before certified a class action in a churning case involving nondiscretionary accounts and that the very few cases in which the question has been presented have denied certification. *Moscarelli v. Stamm*, 288 F. Supp. 453, at 462 (E.D.N.Y. 1968) ("A reading of the churning cases illustrates the personal character of most of the contacts involved in this tort."); *see also Stevens v. Woodstock, Inc.*, 372 F. Supp. 654, 656-57 (N.D. Ill. 1974). These cases are a subset of two general lines of authority holding that class certification is improper where plaintiffs must prove individual reliance or oral misrepresentations. "[A] fraud class action cannot be certified when individual reliance will be an issue". *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996); *see also Hudson v. Delta Air Lines, Inc.*, 90 F.3d 451, 457 (11th Cir. 1996); *Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1025 (11th Cir. 1996); *Sprague v. General Motors Corp.*, 133 F.3d 388, 398 (6th Cir. 1998); *Broussard v. Meineke Discount Muffler Shops, Inc.*, 1998 WL 512926, at *10 (4th Cir. 1998); *Lance v. Wade*, 457 So. 2d 1008 (Fla. 1984). "Fifth Circuit case law even suggests a *per se* prohibition against class actions based on oral representations. *See Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 482 F.2d 880, 882-83 (5th Cir. 1973)" as quoted in *Broussard v. Meineke*, 1998 WL 512926, at *9 to the same effect. This rule has been followed by courts in the Eleventh Circuit. *See, e.g., Kaser v. Swann*, 141 F.R.D. 337, 339 (M.D. Fla. 1991); *Westlake v. Abrams*, 575 F. Supp. 58, 62 (N.D. Ga. 1983). In addition, at least four other circuits have held that class treatment is inappropriate in cases involving oral communications. *See Sprague*, 133 F.3d at 398; *Retired Chicago Police Ass'n. v. City of Chicago*, 7 F.3d 584, 597 n.17 (7th Cir. 1993); *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1081 (6th Cir. 1996); *Clark v. Watchie*, 513 F.2d 994, 1000 n.13 (9th Cir. 1975).

The district court transformed plaintiffs' individual churning claims into an instrument of class-wide liability by *first* inventing a new cause of action that eliminated the need to prove what plaintiffs could not possibly prove—*class-wide churning in nondiscretionary accounts*. Instead, under the court's new cause of action, liability is based on defendants' *omission* or failure to disclose the Alleged Scheme to Churn. To prove the Alleged Scheme to Churn, plaintiffs had only to prove that *some* (not all) MOI salesmen were engaged in churning. To prove the actionable omission, plaintiffs had only to prove that MOI did not disclose *that fact*—that some brokers were engaged in churning—to all of its customers. *Waters*, 172 F.R.D. at 483, 491. To prove that *some* MOI brokers engaged in churning, plaintiffs' counsel called four out of more than 800 MOI brokers. By its newly invented actionable omission claim, the district court enabled all of MOI's customers to recover all of their investment losses over a five-year period whether or not their accounts were affected by any churning. Any such rule would enable class action attorneys to transform any case involving limited churning claims into instruments of class-wide liability which could bankrupt the largest brokerage houses.

Second, the district court repealed the universally recognized requirements of individual reliance and transaction causation of the Florida SIPA. In doing so, the district court: (1) contradicted itself; (2) ignored a fundamental principle of tort law; and (3) consciously disregarded *controlling* authority from this Court.

The district court initially recognized that plaintiffs had to prove transaction causation: "[I]t is undisputed that the 'boiler room' statute, specifically § 517.301, requires proof of causation to establish liability"; that is, plaintiffs had to prove that the omission caused plaintiffs' purchases.[8] (R13-511 at 3)

---

[8] Plaintiffs' counsel, themselves, acknowledged their burden to prove transaction causation. "Plaintiffs agree that they must prove transaction

It was only when it became apparent that adherence to that position would preclude class-wide liability that the court jettisoned both reliance and transaction causation: ". . . the court now holds that reliance is not an element of a cause of action under Section 517.301 . . . ." (*Waters,* 172 F.R.D. at 496); "The boiler room claim . . . the way I structured it— there is no causation requirement". (R120-1433 at 7844-46)

Those holdings disregarded the fundamental requirement of causation in any tort claim which has been specifically recognized by this Court: "Whether proceeding under a strict liability or a negligence theory, proximate cause is an essential element of any cause of action sounding in tort." *Lamb v. Sears, Roebuck & Co.*, 1 F.3d 1184, 1190-91 (11th Cir. 1993).

Most seriously, those holdings were made in conscious disregard of *controlling* authority from this Court. *See First Union Discount Brokerage Servs., Inc. v. Milos*, 997 F.2d 835, 844 (11th Cir. 1993); *see also Gochnauer v. A.G. Edwards & Sons, Inc.*, 810 F.2d 1042, 1047 (11th Cir. 1987); *Alna Capital Assocs. v. Wagner*, 758 F.2d 562, 565-566 (11th Cir. 1985); *Butterworth v. Quick & Reilly, Inc.*, 998 F. Supp. 1404, 1411 (M.D. Fla. 1998); *Jankovich v. Bowen*, 844 F. Supp. 743, 749 (S.D. Fla. 1994); *In re Sahlen & Assocs., Inc. Sec. Litig.*, 773 F. Supp. 342, 370-71 (S.D. Fla. 1991); *E.F. Hutton & Co., Inc. v. Rousseff*, 537 So. 2d 978, 981 (Fla. 1989); *Kashner Davidson Sec. Corp. v. Desrosiers*, 689 So. 2d 1106, 1107 (Fla. Dist. Ct. App. 1997); *Whigham v. Muehl*, 500 So. 2d 1374, 1380 (Fla. Dist. Ct. App. 1987).

This Court has made it unmistakably clear that the Florida SIPA requires proof of reliance:

---

causation (*i.e.*, but/for causation) *as part of their liability showing.* There is nothing new here. Transaction causation is subsumed in § 517.301(2) which section the Court has ruled applies to the ETOs at issue here." (R9-397 at 7) (emphasis in original)

> To establish a § 517.301 claim, the Miloses had to prove that, in connection with a securities transaction, they justifiably relied on, and were proximately harmed by, a false representation or omission of material fact negligently made by First Union.

First Union, 997 F.2d at 844. *All* of the other cases cited above articulated the same holding. Many of those authorities were cited to the court below. (R9-424) The district court's knowing elimination of the reliance and transaction causation requirements in the face of squarely contradictory *controlling* authority betrays an impermissible zeal to reach class-wide liability regardless of the applicable law.

Third, the way in which the district court stripped defendants of the comparative negligence defense available to them under Florida law plainly reveals that court's unmistakable result-orientation. When confronted with the question whether the comparative negligence defense applied to negligent misrepresentations, this Court certified that question to the Florida Supreme Court. *See Gilchrist Timber Co. v. ITT Rayonier, Inc.*, 95 F.3d 1033, 1033 (11th Cir. 1996). The Florida Supreme Court decided unanimously that it does. *See Gilchrist Timber Co. v. ITT Rayonier, Inc.*, 696 So. 2d 334, 335 (Fla. 1997). At least thirteen other states which have considered this question have reached the same conclusion. *See id.* at 337 n.1.

When defendants raised their comparative negligence defense in the court below, that court, alarmed that the defense would destroy the viability of the class action, first asserted that proof of a Florida 10b-5 violation under Section 517.301 of the Florida Statutes did not require negligence, that liability could be premised on an innocent misrepresentation:

> . . . if you [plaintiffs] buy into their [defendants] argument on negligence, then you're going to buy into their argument on comparative negligence . . . . (R74-1387 at 1546)

> . . . the statute creates the duty; you breach the duty whether you do it innocently, negligently or intentionally. Doesn't matter. You're still liable. (R73-1386 at 1521)

When plaintiffs' counsel refused to accept the court's extremely generous, but plainly erroneous, construction of SIPA, the court asserted that the comparative negligence defense does not apply to negligent misrepresentations. *First Union*, 997 F.2d at 844-45. Apart from being wrong (*see* the *Gilchrist Timber* case cited above), the court proceeded in a manner that left no mistake as to its result-oriented agenda. The court successively asserted that: (1) that the Florida Supreme Court's decision in *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973), does not constitute common law: "Well I do want to remind everyone that *Hoffman v. Jones* is not common law, never was, can't be, is not. Common law refers to the English tradition which has come down to us over the centuries and the common law is not comparative negligence"—an assertion which is both contrary to Florida law and obviously wrong (R120-1433 at 7849); *see, e.g., City of Miami v. Bethel*, 65 So.2d 34, 39 (Fla. 1953); (2) "common law comparative negligence is fundamentally at odds with the concept of joint and several liability"—despite controlling Florida authority to the contrary (R101-1415 at 4636); *Moore v. St. Cloud Utils.*, 337 So. 2d 982, 984 (Fla. Dist. Ct. App. 1976); and (3) common law comparative negligence does not apply to statute-based negligence causes of action—despite the fact that the Florida courts have repeatedly ruled that it did. (R101-1415 at 4636); *see, e.g., deJesus v. Seaboard Coast Line R.R. Co.*, 281 So. 2d 198 (Fla. 1973).

Fourth, the court ruled that the proper measure of damages under SIPA was plaintiffs' entire investment in ETOs during the five-year class period. *Waters*, 172 F.R.D. at 491, 498, 506. That measure of damages was completely inappropriate in this case because the plaintiffs had in fact received exactly what they bargained for—the right to purchase a commodity futures

contract at a fixed price in exchange for a market-determined premium and a fully disclosed commission. The fact that some plaintiffs may have not profited by selling those options in no way negates the fact that all MOI customers received and enjoyed exactly what they bargained for.[9]

By these rulings, the district court conferred a pure and undeserved windfall which allowed all of MOI's customers to receive all of their investment losses over a five-year period, *including those customers who never received any broker recommendations, those who had honest brokers, and those who paid no attention to whatever the broker was saying.* Indeed, it included MOI customers who had rejected their brokers' recommendations *not* to purchase ETOs and proceeded to purchase them despite that advice.

Mr. Grosfeld was exposed to the threat of an unbondable and immediately enforceable judgment for $120,000,000 in alleged "damages" and $100,000,000 in prejudgment interest as a result of two aspects of the litigation below: (1) the district court's completely unjustifiable rulings; and (2) plaintiffs' counsel's unreasonable demand that a case with alleged damages of $120,000,000 be settled for no less than $90,000,000—a demand they admittedly maintained through seven years of litigation and five months of trial until January 26, 1997, when they abruptly abandoned it for a class settlement of approximately $6,450,000 so that they could claim a fee of $13,333,333. (*See* pp. 29-32, *infra*)

3. Plaintiffs failed to offer any evidence of a scheme to defraud at trial.

At trial, not a single customer testified. The two named plaintiffs did not even appear to support their claim that their

---

[9] In *Martin v. Heinold Commodities, Inc.*, the Illinois Supreme Court held that loss of investment was *not* an appropriate remedy for an option purchaser who complained of alleged misrepresentation of the broker's fee. *Martin v. Heinold Commodities, Inc.*, 643 N.E.2d 734, 749 (Ill. 1994).

accounts had been excessively traded. Instead, plaintiffs sought to prove their case by offering the NFA and CFTC complaints into evidence, which the court accepted, and the testimony of four brokers (out of hundreds employed by MOI) and a few select administrative employees. These employees testified that there were incidents of individual dishonesty by brokers and that the compliance department did not take effective action against some brokers who engaged in such misconduct. (*E.g.*, R78-1392 at 545-550, 615; R80-1394 at 666, 670, 688, 723, 754-756, 759-760; R84-1398 at 1551-1552, 1563-1564, 1566) Plaintiffs did not offer any testimony that any customers who were told inaccurate statements by MOI brokers purchased any commodity as a result of such a statement. Any MOI customer who had a complaint had available customer-friendly arbitration forums sponsored by the NFA and CFTC. (R86-1400 at 2158; R13-1427 at 6908) Some MOI customers filed such claims, all of which were either settled or litigated to conclusion.

Virtually none of plaintiffs' witnesses testified that they committed fraudulent acts; rather, they all decried the wrongful conduct of others. *No one testified that any scheme to defraud the plaintiff class was implemented, agreed to, discussed or even mentioned.* (R80-1394 at 760; R81-1395 at 1422, 1425; R85-1399 at 2008; R86-1400 at 2139; R87-1401 at 2426; R89-1403 at 2611, 2615; R90-1404 at 2925, 2980; R96-1410 at 3642; R97-1411 at 3883, 3906, 3969, 4005, 4006; R105-1419 at 5039, 5040, 5166; R106-1420 at 5321; R107-1421 at 5529, 5614, 5690; R108-1422 at 5821; R109-1423 at 5995, 5996, 6027, 6035, 6036; R110-1424 at 6248, 6343; R112-1426 at 6558, 6221-6222, 6683, 6684, 6728; R113-1427 at 6816, 6865, 6911, 6933; R114-1439 at 7056, 7101, 7196) Management did admit that certain problems existed and that on reflection they did not take severe enough action against certain brokers. (R82-1396 at 1155-1156; R97-1411 at 3976-3977, 3840-3841, 3938) Nonetheless, they all testified that they attempted to operate the

company in an honest fashion. (R82-1396 at 1138, 1317-1318, 1326; R96-1410 at 3819-3821)

Plaintiffs relied heavily upon a report prepared before the class period by Selwyn Isakow, (PX 148) a business consultant with a degree from the Wharton Business School. Mr. Isakow had no commodities experience prior to providing consulting services to MOI. (R85-1399 at 1961) Mr. Isakow referenced certain high-pressure sales practices in his report (PX 148 at 42) but, at trial, he described his statement relating to "high pressure sales" as referring to aggressive, not fraudulent, sales practices. Mr. Isakow also noted, in his report and at trial, that the compliance department was performing well and with the full support of management. (*Id.* at 15; R85-1399 at 1982-1983, 2024) At trial, Mr. Isakow denied that he was aware of any fraudulent scheme. (R85-1399 at 1979-1980, 2008) Mr. Isakow was so impressed by the company that he became Chairman of MOI's parent company and negotiated the right to purchase a 20% interest in MOI. (R85-1399 at 1842, 1986; R86-1400 at 2093)

Rather than offer any direct evidence of a scheme, plaintiffs argued that 90% of MOI's customers collectively lost $118 million, and of that amount, $96 million went to MOI in commissions and only $22 million was lost to the market. (R75-1389 at 29-30) In fact, the $96 million of gross commissions earned by MOI represented 25% of the $384 million of option premiums purchased by MOI's clients. Accordingly, MOI's customers invested a total of $480 million (premiums plus commissions) of which $120 million (or 25%) was lost.

Plaintiffs misrepresented the significance of commissions to cause the jury to believe that the large losses incurred must have been the result of a scheme to generate commissions at MOI. *Plaintiffs, however, did not offer any evidence that the account performance of MOI's customers was materially different from any other commodity option brokerage firm*

irrespective of commissions paid. It is common knowledge that commodity options are highly speculative and most people who invest in them lose money. Commodity options are a time-wasting asset which can be profitable only if the price of the underlying commodity changes sufficiently within the term of the option. Unlike stocks where every investor can make money with an appreciating stock, commodity options investing is a "zero sum game". (R119-1432 at 7740) A commodity option requires two parties—the grantor of the option, who receives the premium, and the purchaser of the option, who pays the premium (such as the MOI customer). In every commodity transaction, one party wins and the other necessarily loses, before commission costs are even considered. (R119-1432 at 7765-66, 7769) The grantors of options win in the majority of transactions because their profit potential is always limited to the premium collected with unlimited loss potential, while the purchaser pays a fixed amount (the premium paid) for an unlimited profit potential. (DX 993)

Numerous witnesses testified that it is common knowledge in the industry that most commodity option speculators have lost money as of the time they close their account. (R83-1297 at 1439; R96-1410 at 3778-79; R97-1411 at 3936-37; R108-1422 at 5848; R112-1426 at 6714; R113-1427 at 6806) Some MOI brokers testified that their sales presentations of ETOs to customers included a specific disclosure that 80% to 90% of all options accounts lose money. (R106-1420 at 5337; R108-1422 at 5848) However, the district court refused to allow defendants to present industry-based evidence that 90% of all commodities investors lose money. (R25-1042)

4. The district court's instructions failed to state an intelligible standard of culpable conduct.

Notwithstanding the district court's erroneous and prejudicial rulings, defendants continued to defend their position through a five month trial. The court denied defendants' Rule 50 motions at the close of plaintiffs' case.

(R29-1291; R100-1414 at 4379-4380) Although it denied those motions, the court was troubled by plaintiffs' failure to prove their Alleged Scheme to Churn:

> It seems to me what the evidence has shown is that, looking at it in the light most favorable to the plaintiffs, that may have been a corporate policy, but how it was implemented and whether it was implemented in such a uniform way that the case really should be a class action I think is pretty questionable. (R100-1414 at 4261)

In rendering its final jury instructions, the district court decided to deal with plaintiffs' failure to prove their Alleged Scheme to Churn by relieving them of their obligation to prove the Alleged Scheme. Instead of being required to prove the Alleged Scheme, the jury instructions permitted a finding of class-wide liability if the jury found an "alleged secret scheme *or wrongful course of business* by adopting various business practices that plaintiffs contend were dishonest . . . ." (R34-1538 at 9) (emphasis supplied) The court then defines, if that is the word, the dishonest business practices as those which "*include but are not limited to* the following:

> targeting unsophisticated investors and persuading them to buy ETOs through aggressive and high pressure telemarketing . . . pressuring brokers to engage in practices intended to keep customer funds in the market . . . concealing its actual business practices from the NFA and the CFTC . . . ." etc. (R34-1538 at 9-10) (emphasis supplied)

The court never defines "dishonest" or "wrongful". To the contrary, the court merely *illustrates* the meaning of "dishonest" by describing a *noninclusive* set of actions, most of which do not constitute actionable conduct. (R34-1538 at 9-10) All the plaintiffs had to prove is any one of a grab bag of "various business practices" *or anything else the jury deems "dishonest"*. (R34-1538 at 9) The instructions, therefore,

permitted the jury to find defendants liable without finding that the defendants had engaged in any rationally defined actionable conduct. After five months of trial, the district court dramatically lightened plaintiffs' burden of proof by abandoning the Alleged Scheme to Churn and allowing the jury to base a liability verdict on an undefined open-ended course of "wrongful" conduct.

The court's instructions recited the general language of the Florida SIPA which is identical to Federal Rule 10b-5. (R34-1538 at 19) The court's instructions then proceeded to instruct the jury to find for the plaintiffs, if they "find . . . that the alleged scheme or wrongful course of business was sufficiently pervasive that it created an undisclosed risk that was material to all of the class members in common . . . ." (R34-1538 at 19-20)

The court's instructions stated that the mere *nondisclosure* of this open-ended "wrongful conduct" was sufficient to establish liability. (R34-1538 at 8) The court's instructions stated that MOI had a duty "to disclose to its customers all material information, including information about the risk of loss of trading ETOs and information about any risks, if any, of investing specifically through MOI". (R34-1538 at 13) The court further instructed that defendants could be found liable merely because they had not disclosed any of the undefined "wrongful" practices, provided only that the jury deemed such practices to pose a material risk. (R34-1538 at 19-20) The court made plain that plaintiffs need not prove that the omission *caused* them to enter into any transaction. "You do not need to find that the omitted fact would have changed a plaintiffs' decision to invest . . . ." (R34-1538 at 13)

Taken as a whole, the instructions empowered the jury to return a liability verdict without proof that defendants engaged in any defined type of actionable conduct and without proof that plaintiffs' purchases had been caused by *any* conduct by defendants. The jury was empowered to render a verdict for

plaintiffs so long as they decided that some number of MOI brokers had engaged in some undefined "dishonest" practices, and that MOI had failed to disclose that fact. The court's action in abandoning an Alleged Scheme to Churn in favor of an open-ended "wrongful course of business" as the criterion of liability pushed its omission-based liability concept into total incoherence. Having provided no definition of the wrongful practices, the court had no rational basis for a presumption that their nondisclosure caused anything, let alone the loss of all the funds invested by all of MOI's customers over a five-year period.

5. Defendants retain Cravath, Swaine & Moore to review their litigation position and negotiate a settlement.

That was the situation which defendants faced on Sunday, January 26, 1997, as counsel prepared their closing arguments. Late in the evening of that day, the law firm of Cravath, Swaine & Moore, acting on behalf of defendants, reached a settlement agreement with plaintiffs' counsel. Cravath had not been trial counsel for defendants, but was retained in the summer of 1996 to review their position in the litigation. That review revealed that plaintiffs' counsel, in an atmosphere of unparalleled animosity, had succeeded in misleading the court into a series of plainly erroneous decisions which exposed Mr. Grosfeld to the jeopardy of a ruinous class-wide judgment.

Upon entering settlement negotiations, counsel discovered that plaintiffs' counsel had been demanding $90,000,000 in cash and had refused to consider any lesser amount. (R35-1546 (Dodyk Decl. at 1-2)) Given that the case was marginal, at best, and that the total losses claimed by the class were $120,000,000, plaintiffs' counsel's demands were patently unreasonable. There was nothing about this case which justified a settlement demand so far outside the normal parameters of securities class-action settlements which generally fall in a range of 2% to 10% of investment loss. (R32-1481, Ex. A at

Table 7b) Despite repeated attempts by defendants' counsel during the Fall of 1996, plaintiffs' counsel made no offer to defendants' counsel of any amount less than their $90,000,000 demand until January 26, 1997. (R35-1546 (Dodyk Decl. at 2)) Plaintiffs' counsel did submit certain bids to a third party escrow during the days preceeding January 26, 1997, which may have been lower.

Late in the evening of January 26, 1997, plaintiffs' counsel abandoned their $90,000,000 demand and agreed to a reversionary settlement which resulted in a class distribution of approximately $6,450,000. They did so notwithstanding the fact that the court had granted them the most favorable jury instructions imaginable. They did so shortly after the district court, in the jury instruction conference, pointedly expressed its growing doubts, after five months of trial, that they had proven their case: "I don't think that the weight of the evidence is necessarily in the plaintiffs' favor on the pervasiveness of these things." (R120-1433 at 7843) As plaintiffs' counsel later admitted, they had become concerned over the prospect of a "defense verdict" or "hung jury" (R126-1442 at 8280, 8294) and concluded: ". . . it's possible two weeks from now we'll have nothing for them . . . ." (R126-1442 at 8298)

6. Plaintiffs' counsel make a nonnegotiable demand for a "clear-sailing" agreement.

Shortly before Christmas 1996, plaintiffs' counsel suspended negotiations in a fit of pique. When defendants sought to reopen negotiations, plaintiffs conditioned resumption on defendants' acquiescence to plaintiffs' counsel's peremptory, nonnegotiable demand for a "clear-sailing" provision pursuant to which defendants' counsel would not "oppose" plaintiffs' counsel's fee. (R35-1546 (Dodyk Decl. at 3)) Defendants' counsel were concerned by the impropriety of plaintiffs' counsel's injection of fee issues into the negotiations when the class recovery had not been settled—a practice which has been condemned by a number of federal

courts. *See, e.g., Prandini v. Nat'l Tea Co.*, 557 F.2d 1015, 1021 (3d Cir. 1977); *Ashley v. Atlantic Richfield Co.*, 794 F.2d 128, 137-138 (3d Cir. 1986). However, since the trial was proceeding under the court's erroneous rules of engagement, defendants' counsel had to acquiesce.

7. Plaintiffs and defendants negotiate a settlement which provides that plaintiffs' counsel will receive a nonassignable deferred obligation in partial payment of their fees.

During the early phases of the negotiations, the Stipulation of Settlement ("Stipulation") provided that the consideration to be received by *both* the class members *and* plaintiffs' counsel would consist of cash and Promissory Notes. The Promissory Notes were to have a term of 10 years, subject to payment on demand after a term of 5 years, bearing interest at the rate of 5.37% and were freely assignable. (R31-1371 at 18-19) In December, the Farella Braun firm announced that they would not agree to taking the Promissory Notes because those notes would be immediately taxable. (R33-1505 at 2) In order for the noncash portion of plaintiffs' counsel's fee to be nontaxable, the obligations involved had to be nonassignable. *See* pp. 65-69, *infra*.

The Stipulation was accordingly amended to provide that whereas the class members would receive "Promissory Notes", plaintiffs' counsel would receive a "deferred obligation". The Stipulation provided: ". . . in no event will any Promissory Notes be directly issued to them [plaintiffs' counsel]". (R31-1371 at 55) The Stipulation expressly made the Promissory Notes assignable, but was silent with respect to the assignability of the deferred obligation. The only reason the Stipulation was amended to give plaintiffs' counsel a deferred obligation rather than a promissory note was to give them a nontaxable and, therefore, nonassignable deferred obligation.

8. Plaintiffs and defendants negotiate a reversionary settlement.

Defendants continued their efforts to settle into January as the trial neared completion. What made settlement possible was plaintiffs' counsel's willingness, on the evening of January 26, 1997, to accept a small fraction of the $90,000,000 they had been demanding. The parties agreed that the case would be settled by a rarely used *reversionary settlement* wherein defendants provided security for payment of all potential claims up to $40,000,000 in the form of a "settlement fund", with all unclaimed funds to revert to defendants. Because only a minority of class members file claims in a securities/commodities class action, the parties knew that most of the "settlement fund" would revert to defendants. The fund was to consist of $10,000,000 in cash with any additional amount up to $30,000,000 in promissory notes or deferred obligations. (R31-1371 at 17, 55)

Pursuant to the settlement, defendants settled the claims of approximately 20,600 customers of MOI who had allegedly lost about $120,000,000 on their purchases of ETOs during the class period. Class members filed approximately 6,600 claims, of which about 5,000 were properly filed in accordance with the Stipulation and entitled to an aggregate distribution of $6,450,000. (R35-1555 at Ex. A (Settlement Administrator's letter, dated September 8, 1997); R35-1563 at 13) The ratio of authorized claims to class members of about 25% is within the predictable range of response expected in securities class actions.

In this rarely used *reversionary settlement:* (1) only class members who comply with stipulated procedures can recover; (2) all claimants are limited to receiving a certain maximum percentage of their losses; and (3) any funds not properly claimed revert to defendants. A *reversionary settlement* is to be distinguished from a *pro rata settlement* in which a defendant agrees to pay a fixed amount, all of which is to be distributed

to the class after payment of legal fees and expenses. In pro rata settlements, all funds which are not claimed by class members are distributed to class members who file claims. If this case had been a pro rata settlement, the 25% of the class who filed qualified claims would receive, in addition, the funds not claimed by the remaining 75%. In pro rata settlements, defendants have no interest in the procedures used to qualify the class members' claims because defendants have settled for a fixed amount. In reversionary settlements, defendants do have such an interest because the cost of the settlement depends on the number of qualified claims.

If this case had been settled on a pro rata basis for $40,000,000 and the district court had followed Eleventh Circuit precedent, the class would have received approximately $24,631,796 and plaintiffs' counsel would have received a fee of approximately $11,968,000,[10] as compared with the class distribution of $6,450,000 and fee of $13,333,333 authorized by the court below.

The greater number, by far, of class action settlements are some form of pro rata settlement. True reversionary settlements are very rare because most experienced class counsel, such as plaintiffs' counsel claimed to be (R32-1480 at ¶ 2), are not willing to gamble on the amount which will actually be distributed to the class, because class counsel anticipate that their fee will be based on the actual class distribution.

Plaintiffs' counsel in this case were willing to take that gamble because they planned to claim a fee based on the nominal settlement fund not the actual distribution. Plaintiffs' counsel took that gamble knowing that an earlier solicitation of claims by MOI's receiver, distributed soon after MOI had closed in 1990, resulted in a response rate slightly over 10%.

---

[10] $40,000,000 – $1,000,000 (settlement administration expense) = $39,000,000; $39,000,000 – $2,400,204 (legal expense) = $36,599,796; $36,599,796 – $11,968,000 (legal fee at 29.92% of $40,000,000) = $24,631,796.

The receiver sent that solicitation to all of MOI's 28,000 customers. Mr. Goteiner, one of plaintiffs' attorneys, admitted that he was aware that only 3,000 MOI customers responded to that solicitation. (R35-1539 at 13) Mr. Goteiner's colleague, Ms. Amy Gustafson, admitted that Mr. Goteiner's law firm had possession of the receiver's mailing list of 28,000 MOI customers. (RS-E at 2)

In a pro rata settlement, the term "settlement fund" denotes the amount which will actually be paid out in legal fees, expenses and class distributions. In a reversionary settlement, it does not. In a reversionary settlement, there is no real settlement fund; rather, the "settlement fund" is merely a security against potential claims. In a similar case, the Fifth Circuit recently found: "no fund was established at all in this case". *Strong*, 137 F.3d at 852. The "settlement fund" in a reversionary settlement is always much larger than the actual distribution because only a minority of class members file claims. In the Stipulation in this case, the "settlement fund" also served as part of the numerator in computing the "Distribution Ratio". The Distribution Ratio was calculated by subtracting legal fees and expenses from the nominal $40,000,000 "settlement fund" and dividing the remainder by the alleged class loss of $120,000,000. Each class member's Recognized Loss was then multiplied by the Distribution Ratio to determine his or her actual distribution. That computation would result in a Distribution Ratio of 18.8% meaning that authorized claimants were limited to recovering 18.8% of their loss.

The amount of attorneys' fees and expenses reduces the Distribution Ratio in a reversionary settlement and, thereby, the actual distribution to the class. In this case, the class members' maximum potential distribution was 33.33% of their Recognized Losses (*i.e.*, $40,000,000 ÷ $120,000,000). (R31-1371 at 44) By reason of the district court's Fee Award of $13,333,333 and expenses, the class distribution was reduced to 18.8% of their Recognized Losses; that is, the class

members' distributions were reduced by 43.6% (from 33.33% to 18.8%) from their potential maximum by the court's Fee Award. *See* p. 47 for a calculation of the distribution the class would have received in this case if the district court had followed Eleventh Circuit precedent.

The Stipulation recited that plaintiffs' counsel would make an application to the district court for an allowance of fees and expenses. (R31-1371 at 54) Counsel were to apply for fees in an amount not to exceed 33-1/3% of the settlement fund. (R31-1371 at 54) The amount of fees and expenses were to be fixed by the district court within the limits of that court's discretion. (R31-1371 at 54) The Stipulation recited that plaintiffs' counsel would apply for payment of their fees and expenses in cash to the extent available. (R31-1371 at 55) Any additional fees or expenses were to be paid in the form of a deferred obligation. (R31-1371 at 55)

9. The district court grants preliminary approval to the settlement.

The district court was advised of the settlement on the morning of Monday, January 27, 1997. The court's initial reaction to the settlement was negative. The court was "enraged". (R129-1434 at 8341) The court accused plaintiffs' counsel of "cutting and running". (R126-1442 at 8293) The court condemned as "outrageous" plaintiffs' counsel's announced intention to seek the entire cash portion of the settlement, leaving the class with only Promissory Notes. (R126-1442 at 8292) The court noted with disdain that class members would receive, on average, a taxable, five-year $1,200 note, paying $66 in interest, which was not redeemable until 2002. (*Id.*)

Plaintiffs' counsel responded that they had become concerned that there might be a "defense verdict" and stated "it would not surprise us if we had a hung jury". (R126-1442 at 8280, 8294) They concluded that the last minute settlement was desirable "because it's possible two weeks from now we'll

have nothing for them". (R126-1442 at 8298) Plaintiffs' counsel were influenced by the court's doubt, expressed after five months of trial, that they had proved their Alleged Scheme to Churn: "I don't think that the weight of the evidence is necessarily in the plaintiffs' favor on the pervasiveness of these things." (R120-1433 at 7845)

Plaintiffs' counsel made their presentation in support of the settlement before the court at the preliminary fairness hearing of January 31, 1997. (R129-1434) During that presentation, plaintiffs' counsel relied on the NERA Study to support their claim that the anticipated Distribution Ratio of 20% to 33-1/3% in this case compared favorably to the ratios of settlements to investment losses in the securities cases studied by NERA. (R33-1513; R129-1434 at 8330)

The district court gave preliminary approval to the settlement at the hearing of January 31, 1997. (R129-1434 at 8351) The court acknowledged that it would be hard-pressed to take the position that the settlement was not "within the range of reasonableness"; which, indeed, it was. (R129-1434 at 8341-8342) Defendants did not again address plaintiffs' counsel's fees until after the fee application was filed on February 20, 1997.

Some three months later, in an order dated May 8, 1997, in which the court restated its clearly erroneous reasons for approval of the fee, the district court gratuitously inserted a comment claiming that defendants' counsel had made some undescribed statement supporting plaintiffs' fee application during an off-the-record conference initiated by the court on January 28, 1997. (R35-1544 at 4) There is no support in the record for the court's statement. That issue was not even addressed by the briefs giving rise to that order. *Despite extensive briefing relating to the fee application, plaintiffs' counsel never once claimed that defendants' counsel made any such statement.* None of the transcripts during the week of

January 26, 1997, contain any such statement. (R126-1442; R127-1440; R128-1441; R129-1434)

The district court's gratuitous insertion of that comment in the order of May 8, 1997, places defendants in a highly awkward position. If we remain silent, we will be accused of tacitly admitting that we supported plaintiffs' counsel's fee application—an admission which is obviously highly prejudicial. If we speak, we run the risk of offending this Court by so directly challenging a member of the judiciary. While defendants are loathe to give offense to any member of the judiciary, defendants must note that the obvious effect of the court's statement is to undermine defendants' appellate position in a manner which is immune from effective appellate review. However, it remains a fact that the court's comment is not only without any support in the record, it is also totally implausible.

First of all, since this was a reversionary settlement in which the projected distribution was approximately $6,450,000, defendants' counsel could hardly anticipate that the district court would actually award a fee which was more that twice that amount. Under these circumstances, any support for plaintiffs' counsel's fee request of $13,333,333 would have constituted a multi-million dollar *gift* to defendants' bitter adversary. It would have been a gift because in the Stipulation of Settlement, the defendants did not agree that the court should give plaintiffs' counsel any particular fee. They agreed only to a process by which the court would set a fee under Fed. R. Civ. P. 23, presumably within the limits of the court's lawful discretion. (R31-1371 at 54-56)

Second, there was no reason for defendants to make such a gift to their adversary. The only question to be decided during the week of January 26, 1997, was the reasonableness of the settlement, not plaintiffs' counsel's fee, which was not even applied for until February 20, 1997. Plaintiffs' counsel had agreed to the settlement stipulation on January 26, 1997. When the conferences with the court took place on January 27, 1997,

and thereafter, plaintiffs were bound. The only thing that defendants' counsel needed was approval of the settlement. The court's approval was in no way dependent upon support of plaintiffs' counsel's fee application by defendants' counsel.

Third, on Monday, January 27, 1997, the district court was extremely critical of the settlement. The court noted with disdain that the average class member would get a $1,200 note. (R126-1442 at 8291-92) The court was aware that plaintiffs' counsel were seeking about $16,000,000 in fees and expenses, leaving only $24,000,000 of security for potential distributions to the class. (R126-1442 at 8267-68) The court denounced plaintiffs' counsel's intention to seek the entire cash portion of the settlement fund as "outrageous", and accused plaintiffs' counsel of "cutting and running". (R126-1442 at 8293) In light of what the court had said, any support by defense counsel for plaintiffs' counsel's fee application would have *harmed* the chances of settlement. The higher the fee, the lower the distribution to the class and the lower the chances of approval. Under the circumstances, any support by defense counsel for plaintiffs' counsel's anticipated fee application could have been the kiss of death.

Fourth, any support by defendants' counsel of plaintiffs' counsel's fee would have been contrary to their clients' financial interests, for the simple reason that defendants had to pay that fee. What possible reason could defendants' counsel have had to support an anticipated fee application which they believed to be grossly excessive? Any statement by defendants' counsel in support of plaintiffs' counsel's fee would thus not only have been unnecessary to secure approval of the settlement; it would have been injurious to the prospects of approval and highly damaging to their clients' financial interests. No defense counsel of sound mind would have made any such statement.

Fifth, it is inconceivable that plaintiffs' counsel would not have vociferously affirmed the alleged statement by defendants'

counsel in one of the numerous memoranda filed below by the parties relating to plaintiffs' fee application. The fact that plaintiffs' counsel *first* came to argue this point only *after* the district court's May 8, 1997, opinion can be explained only by one fact—the statement was never made.

10. Plaintiffs' counsel's fee application misrepresented the settlement as involving a "$40,000,000 recovery", provided no lodestar information and submitted one page in support of a request for $2,586,611 in expenses.

Plaintiffs' counsel submitted their fee and expense application on February 20, 1997. (R32-1482) Relying on the clear-sailing provision, plaintiffs' counsel's submission failed even to pay lip service to the standards applicable to such applications. Plaintiffs' counsel submitted a single sheet of paper in support of $2,586,611 in expenses and supplied no information concerning the time devoted to this litigation beyond their bare assertion that 33,313 lawyer hours and 29,885 legal assistant and coder hours had been expended, which counsel valued at $12,663,897, based on their 1997 rates. (R32-1482 at 20, 30)

More seriously, plaintiffs' counsel's fee application misrepresented the amount to be actually distributed. (R32-1482 at 23-25) Plaintiffs' counsel repeatedly and falsely claimed that the purely nominal $40,000,000 figure, used to compute the claimants' Distribution Ratio, represented the amount which would actually be distributed and disingenuously compared that nominal figure with amounts actually distributed in other cases. (R32-1482 at 23-25)

Plaintiffs' fee application nowhere disclosed that this was a reversionary settlement in which the actual recovery would be a small fraction of the nominal "settlement fund". Plaintiffs' counsel's assertion that there would be a "$40,000,000 recovery" in this case was false and their comparison of that

"recovery" with actual distributions in the securities class actions studied by NERA seriously misleading.

Plaintiffs' counsel's fee application proceeded to compare the "recovery" in this case to those studied by NERA in the most unrealistic terms, describing the results as "truly unprecedented", "extraordinary", "historic" and "nothing short of spectacular", despite the fact that the projected distribution would most likely fall in the middle of the range of average class action settlements of 2% to 10% of investment loss ($6,450,000 is 5.37% of $120,000,000). (R23-1481 at Ex. A, Table 2b; R32-1482 at 2-3; R32-1480 at ¶ 17)

The class notice provided no clear warning that plaintiffs' counsel would seek a fee of $13,333,333 *regardless of* the amount distributed to the class. There was no hint that the Fee Award might be as high as 200% of the class distribution, and over 400% of Eleventh Circuit precedent or that the Fee Award would sharply reduce the class distribution. *See* p. 49, *infra*.

Defendants' concern was heightened by plaintiffs' counsel's contemporaneous attempt to suppress disclosure by the Settlement Administrator of the fact that only a minority of class members in this case could be expected to file claims. (R34-1530 at ¶ 11) The Settlement Administrator in this case, Garden City Group, had prepared its standard engagement letter. (R34-1530 at Ex. C) That letter disclosed that the Settlement Administrator expected no more than 7,000 to 10,000 of the 20,600 class members to file claims. (R34-1530 at Ex. C) Plaintiffs' counsel then demanded that the Settlement Administrator delete that disclosure. (R34-1530 at ¶ 11) Upset by plaintiffs' counsel's demand, the Settlement Administrator disclosed that demand to defendants' counsel. (R34-1530 at ¶ 11) Believing that the attempted suppression was intended to mislead the court, defendants' counsel filed the unredacted engagement letter with the court. (R34-1530 at ¶ 11)

11. Plaintiffs' counsel renege on their agreement with defendants by seeking to "revise" the settlement stipulation to make their deferred obligation fully assignable.

Plaintiffs' counsel also moved for an order revising the terms of the Settlement Stipulation to make the deferred obligations to be issued to them freely assignable in direct repudiation of their earlier agreement. (R32-1482 at 3 n.4) The Stipulation provided for the payment of $10,000,000 in cash with any additional amount to be funded by issuing Promissory Notes to the class members and a deferred obligation to plaintiffs' counsel. (R31-1371 at 17) Plaintiffs' counsel initially requested that all the cash be paid to them. (R126-1442 at 8271) It was only after the district court deemed plaintiffs' counsel's intended appropriation of all the cash "outrageous" on January 27 that plaintiffs' counsel proposed that they and the class each take 25% in cash and 75% in Promissory Notes or deferred obligations. (R126-1442 at 8292; R132-1518 at 81-82) It was the court's condemnation, which occurred *after* execution of the Stipulation, that caused plaintiffs' counsel to realize they would be receiving a larger deferred obligation and to renege on their agreement to take a nonassignable deferred obligation. (R126-1442 at 8278, 8306-11; R129-1434 at 8343) As the plaintiffs' counsel put it to the court in their fee application:

> The Stipulation had provided that the cash portion of the Settlement fund would be used to pay attorneys' fees and other costs. Because plaintiffs' counsel have agreed to stand as equals with class members and accept payment of fees and expenses in 25% cash/75% deferred compensation, *it is necessary to revise the language* in the proposed Final Order that accompanies the Stipulation.
>
> Specifically, *the Final Order must now provide that Plaintiffs' counsel can transfer or pledge their*

> *interest in any deferred compensation, just as class members are permitted to do* with their notes under the terms of the Stipulation. If Plaintiff's counsel are to accept 75% of their fees and expenses in deferred compensation, *they need the same flexibility* in managing the deferred portion of their payment *as has been afforded to class members.*

(R32-1482 at 4 n.4) (emphasis supplied) Thus, in their initial filing, plaintiffs' counsel admitted that they were seeking to "revise" the Stipulation through amendment of the Final Order. (*Id.*) Defendants' protests that plaintiffs had reneged were met with a cynical pretense that the parties had agreed to an assignable obligation despite plaintiffs' counsel's earlier admission that this was not true.

12. The district court awards plaintiffs' counsel a fee which is over 200% of the actual class distribution and 400% of Eleventh Circuit precedent.

Plaintiffs' counsel's actions presented defendants' counsel with a dilemma because plaintiffs' counsel had extracted a "clear-sailing" agreement from defendants by their peremptory, nonnegotiable demands. (R35-1546) Defendants sought to resolve their dilemma by limiting their presentation to a correction of plaintiffs' counsel's misstatements and citation of relevant authority. (R33-1508; R33-1513) At no point did defendants' counsel argue what fee decision the court should reach within the ambit of its lawful discretion.

The district court proceeded to award plaintiffs the full $13,333,333 demanded as attorneys fees plus $2,400,204, expenses which comprised 90% of the expenses requested, of which the court has already distributed $5,000,000 in cash. (R132-1518 at 94-100) In reaching its decision, the district court ostensibly relied on 29 Eleventh Circuit cases discussed in the NERA Study and took as its "benchmark" the fact that

these earlier cases had awarded fees averaging 29.92% of the settlements in those cases. (*Id.* at 87)

Defendants pointed out that the NERA Study cases all involved actual distributions, that the fees awarded were invariably less than 50% of the actual class distributions, and that plaintiffs' fee request in this case, was far in excess of the actual distribution. (R34-1532 at ¶ 18; R32-1482, Ex. A at Table 12b; R34-1528, Ex. A at ¶ 15; R34-1528 at 3-4) The court was enraged by defendants' remarks and criticized their presentation as "frivolous", "specious" and "distasteful". (R35-1544 at 7) In awarding plaintiffs' counsel the full amount of their exorbitant fee request, the district court simply refused to consider the gross disparity between its Fee Award, at over 200% of the actual distribution, and the prior Eleventh Circuit awards in the NERA Study cases of less than 50%. (R32-1482, Ex. A at Table 12b; R34-1528, Ex. A at ¶ 15)[11]

The court justified its failure to consider the actual amount of the distribution by misconstruing the *Boeing* case as mandating reliance on nominal settlement amounts. (R132-1518 at 84-85) The court refused to acknowledge that the NERA Study cases involved actual distributions, arguing illogically that the Study did not "consider" whether the distributions were actual. (R35-1544 at 3-4)

In deciding the Fee Award, the district court gave no weight to the benefit conferred upon the class. (R132-1518 at 92) The court went on to note that "plaintiffs' counsel has supplied the court with a dearth of information concerning their actual time and labor required to prosecute the case". (*Id.* at 88) In fact, plaintiffs' counsel had supplied the court with only their aggregate claimed hours (63,158), a valuation of that time using 1997 billing rates ($12,663,897), even though their services had

---

[11] The district court was aware that this was a reversionary settlement. Plaintiffs' counsel noted that when initially telling the court a settlement had been reached on January 27, 1997, and defendants' filings made that clear. (R126-1442 at 8274)

been rendered over the preceding seven years, and a schedule showing rates over the duration of the lawsuit. (R32-1480 at 3) Plaintiffs supplied no information justifying their claimed time, and the court, in contrast to many others, did not require a lodestar presentation. *See, e.g., In Re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 348 (N.D. Ga. 1993).

The court justified its award on two principal grounds. *First*, the court claimed its unprecedented award was justified as a reward for the prosecution of a "well-conceived" class action. (R132-1518 at 85) *Second*, the court relied on its general impression that this case involved more effort than most securities cases. (*Id.* at 87-94) The court noted that, for some reason, no other counsel had sought to represent the class, and that unlike most securities cases, this case did not settle prior to the commencement of trial. (*Id.* at 93) The court found that the case involved many "novel" issues, singling out the reliance issue as an example. (*Id.* at 60, 88) In the end, the district court decided to make a Fee Award which is more than four times the highest award given in the Eleventh Circuit cases studied by NERA as a reward to plaintiffs' counsel for bringing a "well conceived class action" (*Id.* at 85) and as a punishment to carry the court's message condemning the sale of ETOs. As shown below, that is an abuse of discretion.

SUMMARY OF ARGUMENT

The district court's Fee Award is an abuse of discretion because it awards fees which are over 200% of the actual class distribution and over 400% of the amounts awarded by prior Eleventh Circuit cases. Virtually all courts that have considered the question have held that fee awards in class action cases should be based on the actual distributions and not nominal settlement funds. The only reason that the district court granted its unprecedented Fee Award is that it mistakenly based its Fee Award in this reversionary settlement on the nominal "settlement fund" and not the actual class distribution. There is no rational justification for awarding class counsel in a

reversionary settlement four times the fee awarded to class counsel in a pro rata case.

Fee awards should be tied to actual distributions to avoid conflicts of interest between the class and their counsel and to recognize and enforce class counsel's responsibility for the actual class distributions they bring about. Any other rule will encourage class counsel to negotiate reversionary settlements so that they may claim inflated fees based on illusory "settlement funds" at the expense of the class distribution.

The fee awarded to plaintiffs' counsel in this case should be tied to the actual class distribution because plaintiffs' counsel negotiated a reversionary settlement with the intention of claiming an inflated fee based on an illusory "settlement fund" at the expense of the class distribution. Plaintiffs' counsel injured the class and unjustifiably imposed upon scarce judicial resources by demanding $90,000,000 to settle a securities class action with an alleged class investment loss of $120,000,000 and delayed settlement of this case for over seven years by their adamant insistence on that unreasonable demand. That delay reduced the number of claimants and the value of the settlement to those who did file claims. Plaintiffs' counsel then abruptly settled the case at the close of a five-month trial, so that they could claim $13,333,333 in fees on the basis of a class distribution of $6,450,000. Plaintiffs' counsel proceeded to further injure the class by submitting an exorbitant and misleading fee application which reduced the class distribution by over $1,000,000 below the amount to which they were entitled under Eleventh Circuit precedent.

The district court justified its exorbitant and unprecedented Fee Award as a reward for plaintiffs' counsel's prosecution of a "well conceived class action". This case should never have been brought as a class action or allowed to proceed as such. Plaintiffs' counsel and the district court transformed plaintiffs' churning claims into a class action by inventing a new cause of action based on defendants' failure to disclose the Alleged

Scheme to Churn and repealing the universally recognized reliance and transaction causation requirements. These rulings permitted all class members to recover without proving what could not be proved—class-wide churning.

The district court proceeded to impose a completely inappropriate measure of damages which guaranteed plaintiffs' recovery of all of their investment losses over a five-year period whether or not their losses were caused by the alleged churning. The district court used these clearly erroneous rulings in defiance of *controlling* authority from this Court to place Mr. Grosfeld in a position of bankrupting class-wide liability in order to send the court's message condemning the sale of ETOs. When the court later became disenchanted with the size of the class distribution, it levied a clearly punitive Fee Award to send its message of condemnation. Plaintiffs' counsel's unreasonable litigation strategy and the district court's suspension of the applicable rules of law have already inflicted $20,000,000 of wholly unjustifiable injury to Mr. Grosfeld.

Mr. Grosfeld cannot fairly be deprived of his right of appellate review by the clear-sailing provision of the stipulation. Pursuant to that provision, defendants agreed only not to oppose plaintiffs' fee application. They did not thereby agree to plaintiffs' counsel's fee, to stand mute in the face of plaintiffs' counsel's misrepresentations or to waive their right of appellate review of abuse of discretion. Defendants agreed only to a process pursuant to which the court would set plaintiffs' counsel's fee on the basis of the actual facts and within the limits of its lawful discretion. The clear-sailing provision is not a license to lie or a waiver of appeal from judicial abuse.

Any such construction would violate public policy. The First and Second Circuits have both condemned clear-sailing provisions as contrary to public policy. The Third Circuit has disapproved the contemporaneous negotiation of class distributions and attorney's fees.

This court should exercise its inherent authority to review plaintiffs' counsel's fee because the fee award has significantly reduced the class distribution. The district court's Fee Award has deprived the class of over $1,000,000 which they would have received if the court had followed Eleventh Circuit precedent. Plaintiffs' counsel's interests on this appeal are adverse to those of the class. Because the district court declined to appoint separate counsel to represent the interests of the class, exercise of this Court's *sua sponte* powers are the only means available to protect the interests of the class against the district court's exorbitant and unprecedented Fee Award.

The district court also erred in granting plaintiffs' counsel's motion to "revise" the settlement to provide that a nonassignable deferred obligation to be taken by plaintiffs' counsel in partial payment of their fees was freely assignable. The court's ruling was rendered in conflict with the language of the stipulation, its negotiating history and plaintiffs' counsel's admissions that they were seeking to "revise" the settlement documents to provide for an assignability which had been granted to the class but not to counsel.

Finally, the district court's decision to award plaintiffs' counsel $2,400,204 in expenses—that is, 90% of the amount requested and 37% of the class distribution—should be vacated and remanded. The court awarded expenses which failed to meet any of the criteria normally applied in such evaluations. Plaintiffs' counsel initially supplied a single sheet in support of $2,586,611 of expenses. Their subsequent submission failed to provide evidence of payment, claimed the reimbursement of overhead and other nonreimbursable expenses and failed generally to justify particular expenses as necessary to the prosecution of this case. Nonetheless, the district court granted 90% of all expenses requested, pointedly disregarding defendants' submission without consideration and abandoning any attempt at a properly-informed, serious-minded review of the claimed expenses.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING ITS WILDLY DISPARATE AND PUNITIVE FEE AWARD

A. The district court's fee award is an abuse of discretion because it is over 200% of the actual class distribution and over 400% of the highest Eleventh Circuit precedent.

The district court abused its discretion in making a Fee Award that, at $13,333,333, constituted more than 200% of the actual distribution of $6,450,000 to be made to the class. The fees awarded in the 29 Eleventh Circuit cases in the NERA Study relied upon by the district court averaged 29.92% of the total paid in fees, expenses and class distributions. (R132-1518 at 87) *In none of those cases did the fee awarded exceed 50% of the actual class distribution.* (R32-1482, Ex. A at Table 12B; R34-1528, Ex. A at ¶ 15) The Fee Award in this case, therefore, is more than four times the highest fee heretofore awarded in this Circuit.[12] The extreme variance of the Fee Award from Eleventh Circuit precedent is, itself, compelling evidence of abuse.

Legislative and judicial authority strongly favors limiting class counsel fees to a reasonable percentage of actual class distributions. The Congress has mandated that result in the *Private Securities Litigation Reform Act* ("PSLRA") for all currently filed securities cases: "Total attorneys' fees and

---

[12] The NERA Study expresses its conclusions in terms of the percentage that fees constitute of the sum of the actual distributions and fees and expenses. Defendants have converted the NERA Study percentages into the percentage relation between counsel fees and the distribution to the class, *e.g.*, class distribution 70 + fee 30 equals total 100; fee is 30% of total settlement (30 ÷ 100) and 43% of the actual distribution (30 ÷ 70). The Fee Award in this case, at over 200% of the actual distribution is, therefore, more than four times or 400% of the 43% of actual distributions in cases earlier decided in this Circuit.

expenses awarded by the court to attorneys for the plaintiff class shall not exceed a reasonable percentage of *the amount of any damages and prejudgment interest actually paid to the class.*" 15 U.S.C. § 77z-1(a)(6) (emphasis supplied). At least one court has applied the policy underlying that legislation to pending litigation:

> "Although this case is not governed by the recently enacted . . . PSLRA . . ., the Court's consideration of the settlement agreement and application for attorney's fees is nonetheless informed by the public policy principles underlying certain of the Act's provisions.
>
> This provision is intended to prevent the payment of attorney's fees based on an inflated settlement figure, where a large part of the settlement is later returned to the coffers of the settling defendant because of a low number of claims. Before awarding fees, therefore, the court must determine what portion of the settlement fund will actually be paid to plaintiffs." *Lyons v. Scitex Corp.*, 987 F. Supp. 271, 273, 279 (S.D.N.Y. 1997).

Virtually all courts which have considered whether to base class counsel fees on actual distributions, as opposed to nominal "settlement funds" in reversionary settlements, have decided that actual distributions constitute the appropriate standard.

> The Court determines that a more reasonable fee results from calculating a percentage of actual recovery.

Wise v. Popoff, 835 F. Supp. 977, 981 (E.D. Mich. 1993).

> . . . [O]ne should nevertheless ask whether a rule of law that would hold that there is an entitlement, on the part of class counsel, to a legal fee fixed in relation to a maximum available fund rather than benefits

> actually realized by the class members, would be a desirable general rule . . . . In my opinion, the answer is certainly no.

Goodrich v. E.F. Hutton Group, Inc., No. 8279, 1996 WL 76161, at *3 (Del. Ch. 1996).

> "When the court rejected the unamended Agreement, it expressed its concern that the attorneys' fees portion of the settlement was unreasonable particularly because it found counsel's $64 million value of the settlement to be illusory . . . . [T]he district court did not abuse its discretion in considering the actual results of the settlement." *Strong v. BellSouth Telecomm., Inc.*, 137 F.3d 844, 851-52 (5th Cir. 1998);

see also In re Prudential Ins. Co. of Am. Sales Practices Litig., 962 F. Supp. 572, 588-89; (D.N.J. 1997), *vacated in part on other grounds*, 1998 WL 409156 (3d Cir. 1998); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 989 F. Supp. 375, 378-79 (D. Mass. 1997); *Bowling v. Pfizer, Inc.*, 927 F. Supp. 1036 (S.D. Ohio 1996); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 348-51 (N.D. Ga. 1993). The only case cited by plaintiffs to the contrary, *Williams v. MGM-Pathe Comm. Co.*, 129 F.3d 1026 (9th Cir. 1997), is a cryptic per curiam opinion which is of no precedential value because plaintiffs' counsel was unopposed and the court rendered a decision uninformed by the adversary process. That case is uninstructive because it arises out of a very unusual situation in which only $10,000 was paid out of a fund of $4,500,000. Moreover, the *Williams* case was a pro rata settlement[13] in which the sole claimant received his entire investment loss.

---

[13] Like most pro rata settlements, the settlement in that case provided for a reversion to the defendants if funds remained after all class members were *fully* compensated for their investment losses to prevent a windfall to plaintiffs.

B. Fee awards in reversionary settlements should be based on actual distributions to avoid conflicts of interest between plaintiffs' counsel and the class they represent.

Had the district court applied the criteria accepted by prior Eleventh Circuit cases, plaintiff's counsel would have to secure an actual total settlement of $44,563,278 and an actual class payout of $31,229,945 to support a fee of $13,333,333 (*i.e.*, $44,563,278 x 29.92% = $13,333,333 (fee); $44,563,278 - $13,333,333 = $31,229,945 (class distribution)). In contrast, the district court below gave plaintiffs' counsel a fee of $13,333,333 based on a distribution of $6,450,000.

The *only* reason that plaintiffs' counsel obtained a Fee Award which is over 400% of the fee which would have been paid in a pro rata settlement is that the district court, in setting the fee, mistakenly used the illusory $40,000,000 "settlement fund" in this reversionary settlement, rather than the actual distribution. There is no rational justification for the distinction between pro rata and reversionary settlements made by the district court's Fee Award. The actual distribution in a reversionary settlement will be a minor fraction of the nominal "settlement fund", whereas the actual distribution in a pro rata settlement will equal the full amount of the settlement fund.[14] The only rule that will result in even-handed treatment of class counsel in these two types of settlements is one which ties the fee to the actual distribution in both cases.

Plaintiffs' counsel's fee should be tied directly to the actual recovery to ensure that their financial interests are aligned with those of the class. Any other rule will create conflicts between the interests of the class and its counsel and invite collusion to devise illusory settlements for the purpose of enriching plaintiffs' counsel. In a reversionary settlement, the lower the

---

[14] The distribution would be reduced by fees and expenses in both cases.

number of class claimants, the greater the reversion to defendants; the greater the reversion to defendants, the higher the nominal "settlement fund" which defendants can accept. To permit plaintiffs' counsel to base their fee on the nominal "settlement fund", therefore, creates perverse incentives for plaintiffs' counsel to make settlements which create illusory "settlement funds" and inflated counsel fees at the expense of the class payout.

That is exactly what happened here. The actions of plaintiffs' counsel in this case determined the actual class payout in a number of different ways. Plaintiffs' counsel is, therefore, responsible for that payout and their fees should be determined by reference to it. That is particularly true in this case because plaintiffs' counsel took various steps designed to enrich themselves at the expense of the class.

First, plaintiffs' counsel are responsible for the fact that this is a reversionary and not a pro rata settlement. They could have negotiated a pro rata settlement. A pro rata settlement for as little as half as much as the nominal "settlement fund", or $20,000,000, would have produced a class distribution of $10,615,796 and a legal fee of $5,984,000.[15] Plaintiffs' counsel chose not to negotiate a pro rata settlement. *Instead, they agreed to a reversionary settlement which produced a class distribution of $6,450,000 so that they could claim a fee of $13,333,333.* Being experienced class counsel, plaintiffs' attorneys knew that only a small fraction of the class would file claims. By negotiating a reversionary settlement with the apparent intention of claiming a fee based on the nominal settlement fund, they sacrificed the class interests in order to enrich themselves.

---

[15] $20,000,000 – $1,000,000 (settlement administration expenses) = $19,000,000; $19,000,000 – $2,400,204 (legal expense) = $16,599,796; $16,599,796 – $5,984,000 (legal fee at 29.92% of $20,000,000) = $10,615,796.

Second, plaintiffs' counsel are responsible for the procedures to which the parties agreed in this settlement. When plaintiffs' counsel agreed to a reversionary settlement, they created an incentive for defendants to bargain for procedures to protect their reversion. The procedures required class members to file Proofs of Claim, to file their Monthly Statements and to do both within the period set forth in the Stipulation. (R31-1371 at 49) While there is nothing unusual in the procedures agreed to, they reduce the number of qualifying class members. Had plaintiffs' counsel negotiated a pro rata settlement, the Stipulation could have provided for an automatic payment procedure, guaranteeing a distribution to all class members, rather than the 24% who will receive distributions in this case.

Third, plaintiffs' counsel are responsible for the fact that this litigation was settled some seven years after it was filed. That delay substantially reduced the number of class members who would file claims. That delay was due solely to plaintiffs' counsel's admitted intransigence in seeking $90,000,000 in cash to settle a case which settled for, and could long ago have been settled for, a distribution of $6,450,000. (R35-1539 at 7-8; R35-1546 (Dodyk Decl. at 1-2)) That delay benefitted only plaintiffs' counsel. At the end of that protracted delay, plaintiffs' counsel abruptly settled the case, for a small fraction of the $90,000,000 that they had been demanding, by means of a reversionary settlement, so that they could claim a fee based on the fiction that plaintiffs would receive "$40,000,000 recovery".

Fourth, and most seriously, plaintiffs' counsel are responsible for betraying the class they were ostensibly representing by pursuing their exorbitant and misleading fee application. The class distribution is reduced for each dollar of additional fee and expense paid to counsel.[16] In this case, the

---

[16] Pursuant to the Stipulation, any reduction in plaintiffs' counsel fees will inure to the benefit of the plaintiff class and defendants, with the larger benefit being conferred on defendants. *See* note 17, *infra*.

class recovery has been reduced from a possible maximum of 33.3% of the class losses to 18.8% as a result of plaintiffs' counsel's exorbitant fee request, a reduction of 43%. Plaintiffs' exorbitant and mendacious fee application reduced the class distribution by approximately $1,050,000 below what they would have received if the district court had followed Eleventh Circuit precedent.[17] If the district court had followed precedent, the class would have received approximately $7,500,000 rather than $6,450,000. Plaintiff's counsel's exorbitant and unprecedented fee award has, therefore, deprived their own clients of over $1,000,000 of their entitlement. Indeed, plaintiffs' counsel initially sought to appropriate the entire cash portion of the settlement. Having delayed this case by some seven years since its filing in April 1990 by their unrealistic and intransigent demands, plaintiffs' counsel then demanded all the cash, leaving the average class member a taxable, five-year $1,200 note, paying $66 in interest, which was not redeemable until 2002—a proposition which the district court called "outrageous". (R126-1442 at 8292)

Having deprived their own clients of $1,050,000 to which they were entitled, plaintiffs' counsel then attempted to suppress all opposition by: (1) concealing the enormity of their fee request in the class notice; (2) first extracting and then misapplying the clear-sailing provision; and (3) most recently

---

[17] Applying the NERA Study average of 29.92% to the actual distribution would have resulted in the following determination: $40,000,000 – $1,000,000 (settlement administration expenses) = $39,000,000; $39,000,000 ÷ $120,000,000 = 32.5% (Distribution Ratio); $34,227,957 (aggregate Recognized Loss of authorized claimants) × 32.5% = $11,124,086 (total class distribution); $12,124,086 (total settlement) × 29.92% (NERA Study average fee) = $3,627,526 (attorneys' fee); $11,124,086 – $3,627,526 = $7,496,560 (actual class distribution net of fees). The class distribution and attorneys' fees would be somewhat smaller when adjusted for appropriate legal expense. No allowance is made for such expense because there has been no proper determination of the expense since the district court's allowance of expenses of $2,400,204 in a case where the distribution is $6,450,000 is obviously excessive.

filing two frivolous motions to dismiss with this court. (R31-1371, Ex. A-2 at 1) In taking these actions, plaintiffs' counsel have transgressed the limits of responsible advocacy in ways which, if successful, would injure the financial interests of the class.

C. The district court's fee award is an abuse of discretion because:

(1) It is based on the court's erroneous interpretation of *Boeing v. Van Gemert*;

(2) It is based on the district court's wilful disregard of the actual distribution to the class; and

(3) It is based on the district court's misconception that this was a "well conceived class action"

The district court's Fee Award constitutes an abuse of discretion wholly apart from the standard of recovery chosen as a benchmark, both in its process and its result. The court's process was abusive because it was based on a pattern of clear legal error and wilful disregard of the facts. The court justified its disregard of actual distributions on the grounds that the Supreme Court's decision in *Boeing* mandates the use of nominal settlement funds. (R132-1518 at 84) That constitutes clear legal error. *Boeing* did not decide whether the court should use actual or nominal distributions in determining counsel fees in reversionary settlements. It decided only that the American Rule against fee-shifting did not bar taxing a portion of whatever counsel fees were awarded against nonclaiming class members in a *pro rata* case. Contrary to the lower court's opinion,[18] *Boeing* did not even involve a reversionary fund

---

[18] ". . . Mr. Dodyk seems to forget that a reversion was part of the settlement in the *Boeing* case". (R132-1518 at 85)

such as the one before this Court. As the Supreme Court expressly stated:

> The District Court explicitly ordered that 'plaintiffs on behalf of all members of the plaintiff class . . . shall recover as their damages herein from the defendants the principal sum of $3,289,359 together with interest . . . .' Nothing in the court's order made Boeing's liability for the amount contingent upon the presentation of individual claims. Thus, *we need not decide whether a class action judgment that simply requires the defendant to give security against all potential claims would support a recovery of attorney fees under the common fund doctrine. Boeing*, 444 U.S. at 480, 100 S. Ct. at 750 n.5 (emphasis supplied, citations omitted).

Other courts that have considered the applicability of *Boeing* to the issue before this Court have correctly held that it did not decide that issue. In *Strong v. BellSouth Telecomm. Inc.*, the Fifth Circuit relied on the *Boeing* passage quoted above to reject plaintiffs' counsel's argument that *Boeing* barred consideration of the amount actually distributed: "[W]e find *Boeing* distinguishable on a more significant ground; unlike *Boeing*, this case does not involve a traditional common fund." *Strong*, 137 F.3d at 852 at 852.n.8. The courts in the *Wise* and *Goodrich* cases correctly concluded that *Boeing* did not decide what criterion—actual or nominal settlement amounts—should be used in deciding what fee should be awarded. *See also Wise*, 835 F. Supp. at 982; *Goodrich*, 1996 WL 76161, at *2:

> . . . [this court's] order limited the fee awarded to one-third of the benefits actually delivered to class members. *The Boeing case does not, in my opinion, require or suggest that that approach was erroneous* (emphasis supplied).

The lower court also abused its discretion by simply refusing to consider the fact that the Fee Award was grossly

disproportionate to the actual distribution when compared to earlier Eleventh Circuit precedent. Seeking to ignore the true significance of the NERA Study, the court illogically argued that NERA did not "consider" whether the Study dealt with actual distributions. (R35-1544 at 3) The issue is not what NERA "considered", but whether the settlements studied by NERA are in fact actual distributions. Instead of undertaking a reasoned inquiry into the prospect that its Fee Award was inconsistent with precedent in the Eleventh Circuit, the court resorted to a series of transparent stratagems to avoid addressing the issue.

In making its erroneous Fee Award, the district court did not rely upon the most important factors governing such awards. *First*, the court placed no reliance on the benefit conferred upon the class, which it treated as a neutral factor. (R132-1518 at 91-92) *Second*, the court placed no weight upon conventional lodestar information, because plaintiffs' counsel provided none. Plaintiffs' counsel supplied only an aggregate number of lawyer and other hours allegedly expended over a five-year period (63,158), which they valued at $12,663,877 using their 1997 rates. (R32-1480 at 3) The court appropriately criticized plaintiffs' presentation as supplying a "dearth of information" (R132-1518 at 88), but the court never asked for, and counsel never supplied, any additional information. Rather, the district relied upon its view that plaintiffs' counsel should be rewarded for bringing a "well-conceived class action" (R132-1518 at 85), and upon the court's general knowledge of the efforts required to prosecute class actions. (R132-1518 at 88) Neither of these factors constitutes a valid basis for the Fee Award.

Plaintiffs' counsel should never have brought this case as a class action and the district court should never have certified it. This case has consumed over seven years of court time, including over 100 motions and five months of trial. Heedless of their imposition on scarce judicial resources, plaintiffs' counsel has made two frivolous motions to dismiss this appeal,

needlessly inundating the Court with hundreds of pages of filings in what plaintiffs' counsel should have known was a futile effort. This case was transformed into a class action by plaintiffs' counsel's ill-advised initiatives and the district court's suspension of the applicable rules of law. The district court invented a new omission-based cause of action and eliminated the traditional reliance and transaction causation requirements from the Florida SIPA in direct defiance of *controlling* authority. (R18-775) This case was not a "well-conceived class action" and the court's award of fees on that basis was an abuse of discretion.

The court's resort to its general knowledge of the efforts required in class action cases is an invalid basis of decision. The court's reliance on this factor is vitiated at the outset by its failure to require any lodestar information. The court's "general knowledge" is no substitute for a serious-minded, properly informed evaluation of counsel's efforts, which then, if necessary, can be reviewed by an appellate court.

Counsel should not be rewarded for the efforts expended to prosecute this case as a class action. It should never have been brought in the first place. Once brought, it should have been settled long ago; it should not have been protracted over a period of seven years and tried over a period of five months. Responsibility for the delay lies with plaintiffs' counsel. It was plaintiffs' counsel's admitted insistence on $90,000,000, up to the day of the settlement, in a case where the alleged aggregate class loss was $120,000,000, which prevented this case from settling years ago (R35-1539 at 7-8). *The ultimate class distribution of $6,450,000 is conclusive proof of the unreasonableness of plaintiffs' counsel's litigation tactics.*

Defendants respectfully request that this Court vacate the Fee Award as an abuse of discretion and determine what fee award is appropriate under the circumstances of this case. In doing so, the Court should consider that the travesty below has

already imposed over $20,000,000[19] of wholly unwarranted injury on Mr. Grosfeld, who was held in this misconceived litigation only as a result of his ownership of MOI's parent under SIPA and the district court's erroneous aider and abettor rulings under RICO and the CEA. Should this Court conclude that remand to a district court is necessary to determine the appropriate fee, defendants respectfully request that the case be remanded to another district court judge. The abuse of discretion committed by the court below grew out of the district court's misguided zeal to levy a punitive Fee Award to punish the sale of ETOs. That misguided zeal led the court to consciously disregard *controlling* authority in transforming this churning case into an instrument of class-wide liability and to subordinate the interests of the plaintiff class in imposing its unprecedented Fee Award. Under these circumstances, it is too much to expect that the court will be able to reconsider its Fee Award free from the misconceptions which resulted in the abuse of discretion.

II. DEFENDANTS' APPEAL IS NOT BARRED BY THE CLEAR-SAILING PROVISION

A. Defendants did not agree to remain silent in the face of plaintiffs' counsel's misrepresentations and the district court's abuse of discretion.

Plaintiffs' counsel's sole defense of its Fee Award in the court below was their argument that the clear-sailing provision of the Stipulation—which provided only that "defendants will not directly or indirectly oppose Plaintiffs' Class Counsel of Record's application for fees and expenses"—should be construed to prohibit defendants from responding to their misrepresentations and protecting themselves against the

---

[19] Mr. Grosfeld has contributed $10,000,000 in cash to the settlement. Counsel fees and expenses incurred defending this case have exceeded $10,000,000.

district court's abuse of discretion (R31-1371 at 55). That is *not* what the clear-sailing provision states and is most emphatically *not* what defendants intended.

The clear-sailing provision must be interpreted in accordance with its language and context. Defendants did *not* agree that plaintiffs' counsel should get any particular fee. Defendants did *not* agree to stand mute in the face of plaintiffs' counsel's misrepresentations. Defendants did *not* agree that they would not appeal the lower court's abuse of discretion. Defendants agreed to a *process* in which the district court would exercise its powers under Rule 23 to set the fee, within the ambit of the court's lawful discretion. Defendants agreed not to argue what fee the court should impose within the limits of its discretion. Defendants made no such argument.(R31-1371 at 55-58) Defendants did not waive their right to insist that the judicial process to which they agreed remain free from abuse and misrepresentation. The clear-sailing provision cannot be construed as license to lie or as waiver of defendants' right to appellate review of judicial abuse.

Any such construction of the clear-sailing provision would be barred by public policy. As shown below, the First and Second Circuits have both disapproved clear-sailing agreements as being contrary to public policy; those policies require, at a minimum, narrow construction of such provisions to protect litigants' abilities to defend themselves against misrepresentation and abuse. If plaintiffs' counsel did misrepresent the nature of the settlement when they called it a "historic" "$40,000,000 recovery", if the district court abused its discretion in making a Fee Award which was 400% greater than Eleventh Circuit precedent, defendants have a right to review of that action and the clear-sailing provision cannot be interpreted to deprive them of that right.

B. Plaintiffs' counsel misrepresented the nature of the settlement.

Plaintiffs' counsel's fee application was clearly false and misleading. The entire application was drafted to create the false impression that the class and its counsel would actually receive $40,000,000. Plaintiffs' counsel said:

- Class counsel obtained a settlement fund of *$40 million* for the approximately 20,000 class members. *This represents approximately one-third of the total class losses. The 1996 NERA Study . . . shows that the average recovery in securities actions, before fees and costs, is under nine percent. The recovery in this case, therefore, is more than three times the national average.* (R32-1482 at 26-27) (emphasis supplied)

- In my years of practice I have never heard of a commercial class action where the result began to approach the settlement in terms of the *absolute settlement figure* . . . . (R32-1480 at 6) (emphasis supplied)

- A study commission by the Federal Judicial Center showed that the median gross monetary settlement was $2,450,000. *The $40,000,000 recovery is therefore a relatively large amount* and bound to have a continuing impact . . . since it must be assumed the industry will understand that this is a large recovery in class action cases. (R32-1481 at ¶ 15) (emphasis supplied)

The fee application nowhere disclosed that this case was a reversionary settlement in which the distribution would be a small fraction of the "$40,000,000 recovery" advertised by plaintiffs' counsel. To the contrary, the application repeatedly referred to the settlement as involving a $40,000,000 "recovery" and misleadingly compared that "recovery" to the amounts actually distributed in the Eleventh Circuit cases studied by NERA.

Plaintiffs' counsel used that misleading comparison as a basis of praising the settlement in the most misleading terms:

- This result . . . is truly unprecedented. (R32-1482 at 2)
- The result in this case is nothing short of spectacular. (R32-1482 at 13)
- The kind of historic commodities class action settlement that plaintiffs could be proud of. (R32-1480 at 7)
- By far the historically highest known recovery in a commodities class action. (R32-1482 at 18)
- It is also apparent in terms of both the absolute amount of recovery as well as the loss recovery ratio that the instant settlement was extraordinary. (R32-1481 at 9)

In fact, the actual class distribution of $6,450,000 is 5.37% of the alleged $120,000,000 investment loss—a result which is squarely in the middle of the historical range for securities class action settlements, that is, 2% to 10% of investment loss. (R32-1481, Ex. A at Table 7b) If the district court had followed Eleventh Circuit precedent, the class distribution would have been approximately $7,500,000 or 6.25% of the investment loss. *See* p. 49, *supra*. Plaintiffs' misrepresentations had their intended effect. The district court's exorbitant Fee Award was explicitly based on their misleading interpretation of the NERA Study cases.

Defendants' counsel were aware that the NERA Study involved amounts actually distributed in securities class litigation and that plaintiffs' fee application was seriously misleading. (R32-1493) Mindful of the clear-sailing provision, defendants limited their presentation to refutation of plaintiffs' counsel's misrepresentations and suggestion of the inadequacy of plaintiffs' counsel's one-page submission in support of $2,586,611 in claimed expenses. (R32-1518 at 189-90) At no time did defendants "oppose" plaintiffs' counsel's fee

application by arguing what fee, within the range of the court's discretion, should be awarded.

C. The district court abused its discretion in making the fee award and disregarding the actual class distribution.

Defendants expected that the district court would welcome correction of plaintiffs' counsel's misrepresentations so that its analysis of the fee would at least be informed by the correct facts. Defendants were mistaken. The district court was once again enraged and denounced defendants' presentation as "frivolous". In doing so, the court disregarded the injunction of the First, Second and Third Circuits that fee requests accompanied by clear-sailing agreements be placed "under the microscope of judicial scrutiny". (*See* cases cited at p. 56-57, *infra.*) (R35-1544 at 6-7)

The district court's denunciations were part of its determined effort to insulate from review the fact that its Fee Award was over 400% of the highest prior Eleventh Circuit award in the NERA Study cases. To justify its wilful disregard of actual distributions, the district court misconstrued the *Boeing* case to mandate disregard of actual distributions and simply refused to acknowledge or consider the gross disparity between its Fee Award and the NERA Study cases. (R35-1544 at 3-5)

The manner in which the district court disregarded actual class distributions in setting the Fee Award constituted a plain abuse of discretion. The district court should have welcomed defendants' exposure of the falsehoods on which plaintiffs' counsel's fee application was based, determined whether the NERA Study cases did involve actual distributions and confronted the fact that its Fee Award was more than four times the awards in the NERA Study cases. The district court's refusal to do so constituted an abuse of discretion, and defendants are entitled to this Court's review of that decision.

D. Other circuit courts have held clear-sailing provisions unenforceable as contrary to public policy.

If the clear-sailing provision were construed as plaintiffs' counsel argue, it would be unenforceable as contrary to public policy. Strong public policy interests have led the First and Second Circuits to condemn clear-sailing agreements. Those policy interests include preservation of the adversary process and the prevention of extortion. The First Circuit expressly condemned clear-sailing agreements in *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518 (lst Cir. 1991).

> Over a decade ago, we first spoke about the important nexus between judicial scrutiny and the avoidance of excessive or undeserved fee awards in the class action environment . . . . The problem has two aspects: extortion . . . and collusion . . . . We think the district court was constrained to recognize as a practical matter that the lawyers were in a position to coerce a fee agreement from G-P regardless of whether there was any merit to their claim . . . . [T]he scenario was such as to suggest, strongly, that the fee request be placed under the microscope of judicial scrutiny. This course was particularly indicated because of the presence of the clear-sailing agreement. Such a clause by its nature deprives the court of the advantages of the adversary process . . . . *Id.* at 524-525.

The Second Circuit has articulated similar concerns:

> I . . . write these additional words only to express a caution concerning the continued use in settlements of a "clear-sailing" clause whereby a defendant agrees not to challenge a plaintiff's request for attorneys fees up to a stipulated amount . . . . A clear-sailing clause has two adverse effects that cast substantial doubt on the legitimacy of its use. First, it deprives the trial court and a reviewing court of the certainty of having

> the propriety of the fee request tested in the adversary process . . . . In future cases, it may be well to scrutinize carefully the use of "clear-sailing" clauses. Perhaps they should be forbidden in all cases.

Malchman v. Davis, 761 F.2d 893, 907-908 (2d Cir. 1985) (Newman, J., concurring).

Similar concerns led the Third Circuit to ban the simultaneous negotiation of class settlements and counsel fees. *Prandini v. Nat'l Tea Co.*, 557 F.2d 1015, 1021 (3d Cir. 1977).[20] Other circuits have used their mandamus powers to ensure defendants' access to the Courts of Appeal to prevent the extortionate misuse of class actions. *See, e.g., In re of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995). Noting that Judge Friendly called "settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements'", the Seventh Circuit issued a writ of mandamus to vacate the district court's class certification, in part, because of the court's "concern with forcing these defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability . . . ." *Id.* at 1298-99. Because this case involves both the extortionate use of an improperly certified class action and the abrogation of the adversary process which those circuit courts have condemned, it cries out for review.

---

[20] Although the Supreme Court's opinion in *Evans v. Jeff D.*, 475 U.S. 717, 734-739 (1986), has caused the Third Circuit to recede from its absolute ban on simultaneous fee negotiation, the Court has continued to scrutinize simultaneously negotiated fees closely to avoid abuse. *Compare Ashley v. Atl. Richfield Co.*, 794 F.2d 128, 137-38 (3d Cir. 1986), *with In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 804 (3d Cir. 1995).

E. Appellate review is necessary to protect the interests of the class against plaintiffs' counsel's misleading and exorbitant fee application.

There is yet another reason why this Court should review the district court's Fee Award, *sua sponte* if necessary. (*See Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355, 360-361 (11th Cir. 1984) and *Washington Gas Light Co. v. Virginia Elec. and Power Co.*, 438 F.2d 248, 250-251 (4th Cir. 1971) for cases in which circuit courts have exercised their *sua sponte* jurisdiction) Under Fed. R. Civ. P. 23, this Court has an obligation to the plaintiff class to determine whether the Fee Award is proper. "[T]he court's examination of attorneys' fees guards against the public perception that attorneys exploit the class action device to obtain large fees at the expense of the class." *Strong v. BellSouth Telecomm., Inc.*, 137 F.3d at 844, 849.

Under the Stipulation, the Fee Award reduced the distribution to the plaintiff class from a possible maximum of 33.3% of their Recognized Loss to 18.8% of their loss. As shown above, the district court's departure from prior Eleventh Circuit precedent deprived the class of $1,050,000 to which they were entitled under these cases.

On this appeal, the interest of the plaintiff class is obviously in conflict with plaintiffs' counsel. Every dollar of Fee Award reduces the distribution to the plaintiff class. The district court denied, *sub silentio*, defendants' motion to appoint separate counsel on appeal to represent the financial interests of the class with respect to the Fee Award on this appeal. (Dist. Ct. dkt. nos. 1591, 1592 & 1597)[21] As a result, defendants are the only party before the Court in a position to represent the adverse interests of the plaintiff class because

---

[21] This citation is to record references in Appeal No. 98-4993 in which Defendants-Appellants have appealed the district court's refusal to appoint separate counsel to represent the interests of the class on fee-related issues raised in this appeal.

those interests are congruent with defendants' interests with respect to the fee application.

The reason that no class member is before this Court is that the class notice provided no hint of the district court's impending abuse of discretion and its effect upon the plaintiffs' class. The notice did not reveal that plaintiffs' counsel would seek nearly $16,000,000 in fees and expenses, *however small the actual class distribution*. It did not reveal that the Fee Award would grossly exceed the projected class distribution. And it most certainly gave no hint that the class distribution would be substantially reduced by an unprecedented and exorbitant Fee Award. (R31-1371 at Ex. A-1) This Court should, therefore, exercise its inherent powers to review the district court's abuse of discretion, if for no other reason than to protect the plaintiff class against its own counsel's unbridled fee demands.

Under the circumstances of this case, it cannot be reasonably said that Mr. Grosfeld forfeited all rights of appellate review because he accepted plaintiffs' counsel's settlement demands rather than submitting to a jury verdict under the rules of engagement defined by the district court.

Plaintiffs' counsel will doubtless argue that defendants could have appealed from any judgment because the district court at one time indicated its willingness to certify certain questions to the Court of Appeals prior to entry of a final judgment. However, even if the district court did so, there was no assurance that the appeal would have been accepted. Moreover, defendants could not reasonably rely on such an assertion because the district court had repeatedly reversed itself during the course of this litigation. The court initially held the Florida SIPA required proof of reliance; the court later changed its mind. *Waters*, 172 F.R.D. at 496. The court first said that the Florida SIPA required transaction causation. When it became apparent that no such proof was possible, the court repealed the causation requirement. (*See* pp. 15-17, *supra*.) The

court initially required plaintiffs' counsel to prove an Alleged Scheme to Churn. When the court came to doubt that plaintiffs had demonstrated "pervasiveness of the scheme", the court eliminated the scheme requirement and would have allowed a jury verdict to stand on the basis of failure to disclose any of an undefined grab bag of wrongful business practices. (*See* pp. 23-26, *supra*) In light of the district court's demonstrated penchant for self-reversal, invariably to defendants' prejudice, they could not reasonably rely on the possibility of an appeal prior to final judgment, given the ruinous and irreversible consequences of an unbondable judgment for over $200,000,000.

That judgment could have bankrupted Mr. Grosfeld. Entry of such an unbondable judgment could have immediately resulted in ruinous consequences which would have become irreversible. Mr. Grosfeld had no rational alternative but to accept the terms demanded of him. That acceptance cannot fairly be used to deprive him of his only possible avenue of relief from the wholly unjustified injury imposed on him by plaintiffs' counsel and the court below.

III. COUNSEL FOR PLAINTIFFS AND DEFENDANTS AGREED THAT PLAINTIFFS' COUNSEL WOULD TAKE A NONASSIGNABLE DEFERRED OBLIGATION

During the early phase of negotiations, the Stipulation provided that the consideration to be received by the class members and plaintiffs' counsel would consist of cash and Promissory Notes. (R131-1549 at 6-7) These Promissory Notes were to be freely assignable and the Stipulation so provided. In December of 1996, plaintiffs' counsel suddenly insisted that they would not take Promissory Notes because those notes, being assignable, would be taxable. (R131-1549 at 10-18; R33-1502 at 2) They demanded that plaintiffs' counsel receive a deferred obligation which, unlike the class members'

Promissory Notes, would not be currently taxable. (R131-1549 at 10-18)

The Stipulation was accordingly amended to provide that the class members would receive Promissory Notes while the plaintiffs' counsel would receive a separate deferred obligation. The Stipulation provided: ". . . in no event will any Promissory Notes be directly issued to [plaintiffs' counsel]". (R31-1371 at 55) The Stipulation made the Promissory Notes assignable, but not the deferred obligation. The *only* reason that the Stipulation was amended to provide that plaintiffs' counsel would not receive Promissory Notes and the deferred obligation was not made assignable was that assignability would have frustrated plaintiffs' counsel's desire to defer taxability. (*See* Gertzman, Federal Tax Accounting, ¶ 3.03[1][d][v] at 3-21: "Taxpayers hoping to benefit from [*Cowden v. Comm'r*, 289 F.2d 20 (5th Cir. 1961)] should evidence the obligations due them in a manner that would limit the marketability of the obligation. *If notes must be used for nontax reasons . . . the note should not be negotiable or assignable.*") (emphasis added). Both plaintiffs' and defendants' counsel understood that the newly created deferred obligation would not be assignable. (R33-1505 (Dodyk Aff.); R32-1482 at 4 n.4)

The nonassignability of that obligation was an important economic consideration in the deliberations leading to defendants' offer. (R33-1505 at 2) The assignability or nonassignability is an important feature of any debt instrument affecting its value. (R33-1505 (Weigers Aff. at 2)) Nonassignability enhances a debtor's ability to retire its debt at a favorable point in the interest rate cycle. (R33-1506 at 1-2)

Plaintiffs' counsel initially requested that the entire cash portion of the settlement be paid to them. (R126-1442 at 8271) It was the district court's condemnation of that request as "outrageous", *after* execution of the Stipulation which caused plaintiffs' counsel to realize that they would be taking a larger deferred obligation and to renege on their agreement to take a

nonassignable deferred obligation. (R126-1442 at 8292; R32-1482; *see also* R132-1518 at 81-82)

Plaintiffs' counsel's initial fee application admitted that they were seeking to "revise" the agreement they had earlier reached with defendants. (R32-1482 at 4 n.4) As the plaintiffs' counsel put it to the court in their fee application:

> The Stipulation had provided that the cash portion of the Settlement fund would be used to pay attorneys' fees and other costs. Because plaintiffs' counsel have agreed to stand as equals with class members and accept payment of fees and expenses in 25% cash/75% deferred compensation, *it is necessary to revise language* in the proposed Final Order that accompanied the Stipulation.
>
> Specifically, the Final Order must *now* provide that plaintiffs' counsel can transfer or pledge their interest in any deferred compensation, *just as class members are permitted to do with their notes under the terms of the Stipulation.* If Plaintiff's counsel are to accept 75% of their fees and expenses in deferred compensation, they need *the same flexibility in managing the deferred portion of their payment as has been afforded to class members.* (emphasis supplied)

(R32-1482 at 4 n.4) Plaintiffs' counsel thus clearly admitted that they were seeking to "*revise*" the Stipulation through the Final Order and stated that the "Final Order must *now* provide that plaintiffs' counsel can transfer or pledge their interest in any deferred compensation *just as class members are permitted to do with their notes under the terms of the Stipulation*". (R32-1482 at 4 n.4) Plaintiffs' counsel sought to secure "*the same flexibility*" as the Stipulation had provided to the class members. *Id.*

It was only when plaintiffs' counsel learned that defendants intended to hold them to their agreement that they disingenuously claimed that their deferred obligation was intended to be assignable all along. (R131-1549 at 10-18) To support their newly discovered assignability argument, plaintiffs' counsel belatedly found a provision in the court's order setting the fairness hearing which referred to plaintiffs' counsel's deferred obligation as "having the same terms and bearing the same interest rates as the Promissory Notes". (R33-1515 at 2)

The provision relied upon proves nothing. The economic terms of the parties' agreement were arduously negotiated and embodied in the Stipulation, not the order entered to establish the procedures for the fairness hearing. The provision relied upon by the plaintiffs' counsel is only a descriptive reference to the Stipulation; it does not purport to redefine the economic terms of the agreement. Plaintiffs' counsel's argument is thus inconsistent with: (1) the Stipulation, which makes the Promissory Notes assignable, but not deferred obligations (R31-1371 at 55); (2) the parties' negotiation history which proves that the Stipulation was amended to provide plaintiffs' counsel with a nontaxable and, therefore, nonassignable deferred obligation (R131-1549 at 6-7); and (3) plaintiffs' counsel's admission that they were seeking to "revise" the settlement documents to obtain an assignability that had been granted to class members but not to them. (R32-1482 at 4 n.4)

Plaintiffs' counsel's fall-back argument that the Uniform Commercial Code mandates the assignability of their deferred obligation is based on a fundamental misconception of the UCC. As the Commentary to Article 9 makes clear, that Article is inapplicable to transactions which are not part and parcel of the business of commercial financing.

> Paragraph (f) [UCC § 9-104(f)] excludes from the Article certain transfers of such intangibles which, by

> their nature, have nothing to do with commercial financing transaction.

U.C.C. § 9-104 Official Comment ¶ 6. The obligations issued for purposes of settling this litigation are *sui generis* and are not part of a commercial financing transaction. *See Schiavone Const. Co. v. City of New York*, 94 Civ. 1153, 1995 WL 714339, at *1 (S.D.N.Y. Dec. 5, 1995), holding that Article 9 of the UCC does not apply to the assignment of an interest relating to litigation because it is within the exclusion of UCC § 9-104(f). *See also Cordis Corp. v. Sonics Int'l, Inc.*, 427 So. 2d 782 (Fla. Dist. Ct. App. 1983), holding that contractual provisions restricting assignability remain enforceable at common law, notwithstanding the enactment of the UCC in Florida. Consequently, the question whether plaintiffs' counsel's interest in the deferred obligation is assignable is determined not by the UCC but by the intent of the parties. And the facts leave no doubt that both plaintiffs' counsel and defendants' counsel intended that the deferred obligation would *not* be assignable. At the very least, the district court should not have decided the issue summarily; it should have held an evidentiary hearing to determine the contractual intention of the parties, as requested by defendants below. (R131-1549 at 7-10)

IV. THE DISTRICT COURT'S AWARD OF EXPENSES IS EXCESSIVE, UNREASONABLE AND NOT SUPPORTED BY ADEQUATE DOCUMENTATION

The district court's award of $2,400,204 in expenses or 27% of the class distribution, is grossly excessive. (R35-1543 at 2) Despite plaintiffs' counsel's failure to comply with even the most basic requirements for proof of expenses, the district court awarded over 90% of the total requested without any informed, serious-minded review of plaintiffs' submission.

Apparently confident of a solicitous reception, plaintiffs' counsel initially submitted a single sheet of paper in support of

their request for $2,586,611 in expenses. (R32-1480) Despite defendants' protests, plaintiffs' counsel delayed filing any additional supporting material until Thursday, March 27, even though the fairness hearing was scheduled for Monday, March 31, preventing any review by class members.

Plaintiffs' counsel's submission remained woefully inadequate. When the defendants pointed out the inadequacy of the plaintiffs' expense submission, the district court sarcastically observed that "defendants' counsel did an exceptional job of putting *us* (referring to plaintiffs' counsel and the court) in this position". (R132-1518 at 103, 107 (emphasis supplied)) The district court went out of its way to make it clear that it had discarded defendants' submission without considering it. (R133-1535 at 4)

There are three fundamental requirements for the reimbursement of expenses: (1) counsel must submit receipts or satisfactory evidence of payment (*see, e.g., Purdy v. Security Sav. & Loan Ass'n,* 727 F. Supp. 1266, 1279-80 (E.D. Wisc. 1989)); (2) the expenses claimed must be necessary for the prosecution of the case and reasonable in relation to the benefit conferred upon the class (*see, e.g., In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296, 1314 (E.D.N.Y. 1985), *aff'd in part, rev'd in part on other grounds,* 818 F.2d 226 (2d Cir. 1987); *In re Boesky Sec. Litig.,* 888 F. Supp. 551, 563 (S.D.N.Y. 1995)); and (3) the expenses claimed must not include certain types of expenses which the courts have held to be nonreimbursable.

There are two general categories of noncompensable expenses. The first are those expenses that are part of a firm's cost of doing business. These expenses are part of the firm's overhead and are incorporated in the attorneys' fee award. *See, e.g., Spicer v. Chicago Bd. Options Exch., Inc.*, 844 F. Supp. 1226, 1257 (N.D. Ill. 1993). The cost of office supplies and clerical assistance are examples of a firm's overhead. *Id.* at 1259 (office supplies); *In re Washington Pub. Power Supply*

Sys. Sec. Litig., 779 F. Supp. 1063, 1097 (D. Ariz. 1990) (clerical assistance), *vacated in part on other grounds*, 19 F.3d 1291 (9th Cir. 1994). The other category of "[n]oncompensable expenses include[s] those which are not adequately supported by detailed records showing the amount of each expense, the reason for the expenditure, and the relationship between the expense and some reasonable benefit to the class". *In re Fleet/Norstar Sec. Litig.*, 974 F. Supp. 155, 158 (D.R.I. 1997).

Although claiming to be experienced class counsel, plaintiffs' counsel failed to comply with any of these basic requirements. (R32-1480 at ¶ 2) They failed to submit invoices for many of their expenses. They claimed expenses which were clearly not reimbursable. They failed generally to show that the expenses were either necessary for the prosecution of the case or reasonable in amount. Plaintiffs' counsel did not describe the specific purpose served by particular expenditures falling within a general category or justify their reasonableness. Rather than thoroughly reviewing plaintiffs' counsel's expense submission, the district court criticized defendants for pointing out plaintiffs' counsel's deficiencies, discarded defendants' submission without considering it and proceeded to award plaintiffs' counsel 90% of their requested expenses even though they constituted a staggering 37% of the class distribution. Because space limitations preclude the analysis of each category of expense, defendants set forth the following examples of the deficiencies and identify the deficiencies affecting each category of expense in tabular form.

The district court's award of the entire $307,209.97 requested by class counsel for computerized legal research is unreasonable. (R34-1521 at 17-19, Tab 7; R133-1535 at 5) Some courts hold that such expenses are not reimbursable. *See In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1370-71 (N.D. Cal. 1996). Even those courts categorizing on-line research as reimbursable hold that such expenditures must be reasonable and supported by adequate justification. *See Lachance v. Harrington*, 965 F. Supp. 630, 651 (E.D. Pa.

1997). Class counsel's listing of on-line charges failed to identify the researcher, the number of searches, the subject matter researched or the time spent on-line. (R34-1521 at Tab 7) Class counsel claimed that to provide such detail would be cumbersome and assured the court that the charges were reasonable. (R34-1521 at 18) Such unsupported assurances will not suffice. Without descriptions of "the nature of the research performed . . . or the total number of hours billed", the court cannot determine whether the on-line research could have been performed using more economical, traditional sources or whether the research was duplicative. *Pozzi v. Smith*, 952 F. Supp. 218, 227 (E.D. Pa. 1997). Computerized legal research "is not always the most efficient method . . . and in the hands of an inexperienced user (or one who has little incentive to keep costs low) can be quite wasteful". *Lachance*, 965 F. Supp. at 651. For this reason the district court abused its discretion by allowing class counsel's full request for on-line research without scrutinizing the nature or amount of the searches.

The district court allowed class counsel to collect the full $148,613.21 requested for secretarial overtime, secretarial services during trial, word processing and computer services. (R34-1521 at 25-26, Tab 10; R133-1535 at 14) Counsel justified these expenses by explaining that it would normally charge such expenditures in addition to fees. (R34-1521 at 25-26) However, that such amounts

> may be charged to regular clients by the firm, or that it is "standard" in the firm's area of practice, is not controlling. Class members will not be assessed an amount that produces a clear and unwarranted profit for the firm.

Washington Pub. Power, 779 F. Supp. at 1112. Secretarial work is part of a firm's normal overhead and is not separately chargeable as an out-of-pocket expense. *Id.* at 1096 (citation omitted). So too, "[w]ord processing is a sub-category of secretarial or clerical expense . . . . [and] should be included in

the overhead built into the percentage fee, just like any other in-house clerical expense". *Morganstein v. Esber*, 768 F. Supp. 725, 726-27 (C.D. Cal. 1991).

Overtime charges for secretarial, word processing and computer service personnel are also not reimbursable: "The expense of clerical support personnel, whether or not the firm is adequately staffed during normal working hours, is not an appropriate element for an expense award." *Washington Pub. Power*, 779 F. Supp. at 1127. Furthermore, class counsel provided no justification for any additional clerical assistance or overtime charges. The documentation supporting the claims does not identify the need for after-hours work or whether it was related to this action. Finally, class counsel did not provide any invoices for the $6,704.67 charged by outside computer service vendors. The district court erred by accepting class counsel's claims at face value.

Set forth below is an analysis of each category of plaintiffs' expense claims, together with the deficiencies affecting each category. Column I sets forth the category of expense. Column II sets forth the amount of expense awarded by the district court. The entries in Column III indicate whether plaintiffs' counsel failed to submit invoices. The entries in Column IV indicate whether plaintiffs' counsel claimed an expense of a type which is not reimbursable under applicable law. The entries in Column V indicate whether plaintiffs' counsel failed to demonstrate that the expense was necessary for prosecution of the case. If an objection (in Columns III-V) applies to only a portion of the expenses in any category, that portion is shown in the relevant column.

I CATEGORY	II EXPENSES ALLOWED	III NO INVOICE	IV NONREIMBURSABLE EXPENSE	V INSUFFICIENT JUSTIFICATION
1. Telephone	33,392.62	X	X(6,313.07)[22]	X
2. Duplicating Microfilm	304,342.08 47,784.09	X(78,446.33)[23] X		X X
3. Facsimile	39,724.11	X	X	X
4. Computerized Legal Research	307,209.97	X	X	X
5. Overnight Delivery Other Delivery	61,939.35 14,359.71	X X	X	X X
6. Travel	274,820.56	X		X
7. Secretarial, Word Processing and Computer Services	148,613.21	X(6,704.67)[24]	X	X
8. Supplies Miscellaneous	39,561.29 7,473.29	X(29,256.80) X(5,337.21)	X X(93.30)[25]	X X
9. Local Counsel Other Attorneys	23,427.02 19,606.01	X(20,426.61) X(2,434.76)	X (fees) X (fees)	X X
10. Zuckerman Firm Costs[26]	57,674.41	X	X(11,383.91)[27]	X
11. Experts and Consultants	496,703.88	X(160,862.57)	X(140,588.16)[28]	X
12. Miscellaneous	411.30	X		X
13. Additional Expenses	63,633.82	X	X(11,409.62)[29]	X
14. Raring & Lipoff Costs	74,404.00	X	X(25,168.20)[30]	X

[22] This figure represents charges for cellular phones and phones on airplanes.

[23] Amount for outside photocopying services.

[24] This amount represents charges for outside computer service vendors.

[25] This amount includes charges for two meals and a book on jury instructions. Meals were disallowed by the district court (R133-1535 at 6:1-18) and the book has application beyond this case and should be included in the firm's overhead.

[26] Awarded by the court during the April 28, 1997, telephonic hearing.

[27] The Zuckerman firm submitted billing statements reflecting various charges. Those categories of expenses that are not reimbursable as expenses include Federal Express ($2,110.99); secretarial ($4,815); fax ($3,524); and electricity ($450). This figure also includes the categories of expenses disallowed by the district court for the Farella, Braun firm: local travel ($354.65) and meals ($129.27). (R133-535 at 6:1-18)

[28] This figure represents charges for jury consultants which are irrelevant to the creation of the settlement ($129,376.86) and charges by attorneys for fees (Fred Konigsberg/Gottlieb & Schwarz: $9,886.30 and James V. McTevia Associates: $1,325) that should be included in the fee award.

[29] The Additional Expenses awarded by the district court are delineated in the Declaration of Judy Craig in Support of Motion of Plaintiffs' Class Counsel to Alter or Amend Judgment with Respect to Cost Award, filed April 21, 1997, and these costs were adjusted in the Declaration of Paul B. Duncan, filed May 1, 1997. (R34-1537) Those costs listed in Mr. Duncan's Declaration which courts have found to be nonreimbursable include fax ($1,080.72); secretarial ($875.82); supplies ($461.13); Federal Express ($1,970.25); and computerized legal research ($7,021.70).

[30] Raring & Lipoff submitted billing statements reflecting various charges, including fax, express delivery, etc. Those categories of expenses that are not reimbursable as expenses for the Farella, Braun firm are similarly unavailable to Raring & Lipoff. While it is difficult to decipher the Raring & Lipoff firm's billing statement, they seem to include charges which courts have found nonreimbursable for fax ($11,341.50), computerized legal research ($10,627.12), Federal Express ($2,862.85) and supplies ($336.73).

As these demonstrated deficiencies make clear, plaintiffs' counsel failed to comply with the most basic requirements for expense reimbursement. Rather than undertaking the informed, serious-minded review of plaintiffs' submission required by the caselaw, the district court summarily discarded defendants' measured presentation and awarded plaintiffs' counsel 90% of all expenses requested even though these expenses, themselves, exceed the sum of fees and expenses awarded in most of the NERA cases, relative to the actual distribution.

CONCLUSION

For the reasons stated above, Appellants respectfully request that this Court (1) vacate the Fee Award; (2) determine the proper fee de novo or remand this case to a district court other than the court below; (3) declare that the deferred obligation to be taken by plaintiffs' counsel is nonassignable; (4) vacate the expense award; and (5) determine the expense award de novo or remand this case to a district court other than the court below.

October 16, 1998

Respectfully submitted,

/s/ Paul M. Dodyk

Paul M. Dodyk
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
Telephone: (212) 474-1000

R. Lawrence Bonner
HOMER & BONNER, P.A.
100 S.E. Second Street
Miami, FL 33131
Telephone: (305) 350-5100

Martin I. Kaminsky
POLLACK & KAMINSKY
114 West 47th Street
New York, NY 10036
Telephone: (212) 575-4700

Attorneys for
Defendants-Appellants

APPENDIX X

Reply Brief for Defendants-Appellants,
dated November 6, 1998
(filed in the United States Court of Appeals
for the Eleventh Circuit)

No. 97-5074

IN THE

United States Court Of Appeals

FOR THE ELEVENTH CIRCUIT

WILLIAM WATERS AND LINDA BARTHOLOMEW,
INDIVIDUALLY AND ON BEHALF OF ALL THOSE SIMILARLY SITUATED,

Plaintiffs-Appellees,

v.

INTERNATIONAL PRECIOUS METALS CORPORATION,
MULTIVEST, INC., JAMES GROSFELD, INDIVIDUALLY AND AS
TRUSTEE OF THE JASON GROSFELD TRUST, MULTIVEST REAL ESTATE,
INC., S.S. MELBOURNE, INC., AND THE CYPRESS GROUP, INC.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

REPLY BRIEF FOR DEFENDANTS–APPELLANTS

Paul M. Dodyk
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
Telephone: (212) 474-1000
Facsimile: (212) 474-3700

R. Lawrence Bonner
HOMER & BONNER, P.A.
100 S.E. Second Street
Miami, FL 33131
Telephone: (305) 350-5100
Facsimile: (305) 379-0918

Martin I. Kaminsky
POLLACK & KAMINSKY
114 West 47th Street
New York, NY 10036
Telephone: (212) 575-4700
Facsimile: (212) 575-6560

Attorneys for
Defendants-Appellants

November 6, 1998

CERTIFICATE OF TYPE SIZE AND STYLE PURSUANT TO LOCAL RULE 28-2(d)

This brief has been typed in 11 point Times Roman font.

TABLE OF CONTENTS

	Page
CERTIFICATE OF TYPE SIZE AND STYLE PURSUANT TO LOCAL RULE 28-2(d)	i
TABLE OF AUTHORITIES	iv
SUMMARY OF ARGUMENT	1
ARGUMENT	8
I. THE FACTS THAT PLAINTIFFS' COUNSEL'S FEE AWARD OF $13,333,333 IS 200% OF THE ACTUAL DISTRIBUTION OF $6,450,000 AND 400% OF THE FEES AWARDED IN PRIOR ELEVENTH CIRCUIT CASES ARE PROVEN OF RECORD.	8
II. THE COURT'S DECISION IN THIS CASE IS NOT CONTROLLED BY THE BOEING OR CAMDEN DECISIONS; THE CASE LAW ESTABLISHES THAT CLASS COUNSEL'S FEES SHOULD BE BASED ON ACTUAL, NOT NOMINAL, CLASS DISTRIBUTIONS.	11
III. AWARDING CLASS COUNSEL FEES WHICH ARE TWICE THE AMOUNT OF THE CLASS RECOVERY BRINGS DISCREDIT UPON THE COURTS AND THE BAR	15
IV. PLAINTIFFS' COUNSEL'S CONDUCT IN THIS CASE DOES NOT WARRANT THE DISTRICT COURT'S UNPRECEDENTED FEE AWARD	18

Page

V. THE CLEAR-SAILING AGREEMENT IN THIS CASE IS NOT A "FEE AGREEMENT", "NEGOTIATED FEE CAP" OR ANY OTHER TYPE OF FEE AWARD AGREEMENT AND DOES NOT INSULATE PLAINTIFFS' COUNSELS' EXORBITANT FEE FROM APPELLATE REVIEW 21

VI. PLAINTIFFS' COUNSEL'S ASSERTION THAT DEFENDANTS SUPPORTED THE REASONABLENESS OF PLAINTIFFS' FEE APPLICATION IN AN OFF-THE-RECORD HEARING TO THE COURT IS FALSE 25

VII. PLAINTIFFS' COUNSEL SEEK TO PREJUDICE THIS COURT BY A FALSE AND SLANDEROUS ATTACK ON DEFENDANTS AND THEIR COUNSEL .. 29

VIII. PLAINTIFFS' COUNSEL'S DEFERRED OBLIGATION IS NOT ASSIGNABLE 34

CONCLUSION 36

TABLE OF AUTHORITIES

CASES	Page(s)
Boeing Co. v. Van Gemert, 444 U.S. 472 (1980)	2, 3, 11, 12, 24
Bowling v. Pfizer, Inc., 922 F. Supp. 1261 (S.D. Ohio 1996)	14
Camden I Condominium Assoc., Inc. v. Dunkle, 946 F.2d 768 (11th Cir. 1991)	2, 3, 11, 12
Chelsea-Wheeler Coal Co. v. Marvin, 35 A.2d 874 (N.J. 1944)	35
City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974)	17, 24
City of Ozark v. Trawick, 604 So.2d 360 (Ala. 1992)	14
Duhaime v. John Hancock Mut. Life Ins. Co., 989 F. Supp. 375 (D. Mass. 1997)	13
Goodrich v. E.F. Hutton Group, Inc., No. 8279, 1996 WL 76161 (Del. Ch. February 2, 1996)	3, 11, 13
Gray v. Andrews, 192 So. 634 (Fla. 1940)	35
In re Copley Pharmaceutical, Inc., "Albuterol" Products Liability Litig., 1 F. Supp.2d 1407 (D. Wyo. 1998)	14
In re Crazy Eddie Sec. Litig., 824 F. Supp. 320 (E.D.N.Y. 1993)	13
In re Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297 (N.D. Ga. 1993)	13
In re Prudential Ins. Co. of Am. Sales Practices Litig., 962 F. Supp. 572 (D.N.J. 1997)	13

	Page(s)
Koppel v. Wien, 743 F.2d 129 (2d Cir. 1984) ...	13
Lyons v. Scitex Corp., 987 F. Supp. 271 (S.D.N.Y. 1997)	13
Orlando Orange Groves Co. v. Hale, 161 So. 284 (Fla. 1935)	35
Rosenfeld v. Collins & Aikman Corp., 1989 WL 150926 (E.D. Pa. December 13, 1989) ...	12
Skelton v. General Motors Corp., 860 F.2d 250 (7th Cir. 1988)	12
Smith, Bell & Hauck, Inc. v. Cullins, 183 A.2d 528 (Vt. 1962)	35
Strong v. BellSouth Telecomm. Inc., 137 F.3d 844 (5th Cir. 1998)	3, 11, 13
Williams v. MGM-Pathe Comm. Co., 129 F.3d 1026 (9th Cir. 1997)	13, 14
Wise v. Popoff, 835 F. Supp. 977 (E.D. Mich. 1993)	3, 11, 13

STATUTES AND RULES

15 U.S.C. § 77z-1(a)(6)	36
Fed. R. App. P. 10(e)	9
Fed. R. Civ. P. 23	17
Fed. R. Civ. P. 52(b)	26
Fed. R. Civ. P. 59(e)	26

SUMMARY OF ARGUMENT

The basic question raised on this appeal is whether this Court should affirm the district court's award of $13,333,333 ("Fee Award") and $2,400,004 in expenses despite the fact that only $6,450,000 will be distributed to the class in this case. (R33-1516; R35-1542; R35-1543; R35-1544; R35-1563 at 13) That Fee Award is over 200% of the class distribution in this case. That Award is more than 400% of the fee awards made in this Circuit in the cases relied upon by the district court and studied by National Economic Research Associates ("NERA Study"). (R32-1481 at Ex. A, Table 12b)

The NERA Study shows *on its face* that fee awards in 29 settled securities class actions in this circuit averaged 29.92% of the total settlements. The amounts of the fees, expenses and class distributions in this case are a matter of record. (R33-1516; R35-1542; R35-1543; R35-1544; R35-1563 at 13) The NERA Study was the source of the comparables used by the district court as the basis of its Fee Award. (R32-1481) It is, therefore, a matter of record that the fee awards in the Eleventh Circuit cases studied by NERA averaged 29.92% of the settlements in those cases. That means that the Fee Award in this case is 400% of the average fee award, relative to the actual class distribution, in the cases relied upon by the court.

Plaintiffs' counsel argue that the NERA Study does not mean what it says and, implicitly, that the amounts actually distributed in those cases were less than the settlement amounts shown in that Study. There is no record evidence to support that assertion and defendants provided sufficient proof that the "settlement amounts" in the NERA Study cases were actually distributed. If the district court had any doubt about that fact, it should have held an evidentiary hearing. The court's refusal to do so is itself an abuse of discretion.

The central question raised on this appeal is whether the unprecedented Fee Award is an abuse of discretion. Plaintiffs' counsel do not address that question. Instead, they seek to

deprive defendants of their right of review by misinterpreting the Stipulation and seeking to prejudice this Court by a stream of slanderous misrepresentations.

This is the first case in which any defendants' counsel has exposed for review plaintiffs' counsel's manipulation of reversionary settlements to create large but illusory "settlement funds" in order to claim exorbitant fees not warranted by the actual distributions. That is an issue of first impression in this Circuit.

The district court's abuse of discretion arose from its erroneous use of the nominal settlement fund in this reversionary settlement, rather than the amount of the actual distribution, as the basis of its Fee Award. (Defendants-Appellants' Brief ("DB") at 45-4) In pro rata settlements, the actual fee is necessarily based on the actual distribution because the entire fund is distributed in fees, costs and class distributions. In their initial brief, defendants demonstrated that there is no justification for awarding class counsel in reversionary settlements 400% of the fees awarded in pro rata distributions. (*Id.*) Defendants demonstrated that awarding fees based on the nominal settlement funds in reversionary cases creates perverse incentives for plaintiffs' counsel to manipulate reversionary settlements so as to blow up the nominal settlement amounts and their fees at the expense of the class. (*Id.*) Defendants demonstrated that the solution to this problem is to base fee awards in reversionary settlements on actual distributions, *as they necessarily are* in pro rata settlements. (*Id.*) Plaintiffs' counsel offer no response to defendants' analysis, preferring to take refuge in an ostrich-like denial of the disparity involved in the Fee Award.

Plaintiffs' counsel claim that this Court is barred from reviewing defendants' claim of abuse of discretion by *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980) and *Camden I Condominium Assoc., Inc. v. Dunkle*, 946 F.2d 768 (11th Cir. 1991). Neither assertion is true. *Camden I* did not rule on

whether nominal settlement funds or actual distributions should be used to calculate attorneys' fees. *Camden I* held only that courts should use the percentage of the fund, rather than the lodestar method of awarding fees to class counsel.

Boeing did not rule on whether nominal settlement funds or actual distributions should be used in determining class counsel's fees. *Boeing* decided only that the American Rule against fee shifting did not bar taxing a portion of whatever fee is awarded against the nonclaiming class members. (DB at 52-56) (*Boeing*, 444 U.S. at 750-51) Plaintiffs' interpretation of *Boeing* has been rejected by federal circuit and district courts and the Delaware Court of Chancery. *Strong v. BellSouth Telecomm. Inc.*, 137 F.3d 844, 852 n.8 (5th Cir. 1998); *Wise v. Popoff*, 835 F. Supp. 977, 982 (E.D. Mich. 1993); *Goodrich v. E. F. Hutton Group, Inc.*, 1996 WL 76161 at *2 (Del. Ch. 1996).

The district court's Fee Award constitutes an abuse of discretion because it was rooted in the district court's misconception that this case is a "well conceived class action". (R132-1518 at 85) The Fee Award was not justified on the basis of the benefit conferred upon the class, which the court properly judged to be no more than average. (R132-1518 at 91-92) The distribution in this case, $6,450,000, is 5.375% of the alleged investment loss of $120,000,000 as compared to 6.7% for the Eleventh Circuit cases studied by NERA.[1] Nor can the court's exorbitant Fee Award be affirmed on the basis of lodestar considerations because plaintiffs' counsel squandered their time and the court's time by *admittedly* insisting on $90,000,000 up to the eve of closing arguments in a case where the loss was $120,000,000, only to accept a $6,450,000 class distribution. (DB at 27, 51)

---

[1] The 5.375% would be slightly higher because of adjustment for *appropriate* counsel fees.

Virtually all of the district court's justifications for the Fee Award rest on the premise that this case was a "well conceived class action", which should be rewarded to encourage others to bring similar actions. (R132-1518 at 85-93) In fact, this case should never have been brought as a class action because it is no more than an overblown churning case, as the district court itself recognized. (DB at 8) This case should never have been certified as a class action because proof that the alleged churning by MOI's brokers affected its customers in nondiscretionary accounts requires proof of individual communications between 800+ brokers and 20,600 MOI customers over a five-year class period. (DB at 11, 13-14)

This case lacks the *sine qua non* of a class action: a common core of fact—a class-wide communication such as a prospectus—which *caused* each member of the class to sustain a recoverable loss. The district court transformed this case into a class action by suspending the applicable rules of law, repealing the universally recognized requirements of reliance and transaction causation in direct contradiction of controlling Eleventh Circuit precedent. (DB at 14-20)

Plaintiffs' counsel make absolutely no effort to defend the rulings which transformed this churning case into a "well conceived class action". That position is logically untenable. To justify plaintiffs' counsel's fee, it is necessary, at a minimum, to show that the district court was right when it found that this was a "well conceived class action".

Aware that they are unable to defend the district court's abuse of discretion, plaintiffs' counsel attempt to deprive defendants of their right of appeal. They do so by misconstruing the Stipulation's "clear-sailing" provision, which states only that defendants would not "directly or indirectly oppose [Plaintiffs' counsel's] application for fees and expenses", into a waiver of defendants' right to appellate protection from an abuse of discretion. (R31-1371 at 53) Aware that the text of the narrowly drafted clear-sailing

provision does not state a waiver of appellate rights, plaintiffs repeatedly mischaracterize that provision as a "fee agreement" or "negotiated fee cap". (PB at 49, 53-54) It was neither.

The Stipulation was not a "negotiated fee cap" because under a negotiated fee cap, if the court sets a fee exceeding the fee cap, the settlement itself is void. Here the class settlement remained binding irrespective of the court's fee decision. The Stipulation here is not a "fee agreement" because a "fee agreement" requires an express statement that the plaintiff and defendant agree to a specific fee, and to the award of that fee by the court. *No fee award language appears in the Stipulation.* Defendants only agreed not to oppose a fee and expense *application*. Every word of the Stipulation was negotiated over a five-month period. It is inconceivable that plaintiffs' counsel, who claim to be experts in class action litigation, would have neglected to set forth in exhaustive detail the economic term most important to their interests. Simply put, defendants agreed to remain silent while plaintiffs made their fee and expense application to the district court.

That agreement cannot be construed to mean that plaintiffs could take advantage of defendants' silence by improperly submitting a misleading fee application claiming a $40,000,000 "recovery" that was "spectacular" and "extraordinary", and a deficient one-page expense application for $2,586,611.

Plaintiffs' strategy is to seek affirmance of the district court's abuse of discretion by prejudicing this Court against defendants by a slanderous attack against defendants and their counsel. Space limitations imposed by the rules of this Court preclude refutation of plaintiffs' counsel's many deceptions except as they relate to the principal issues on this appeal. In this Reply, defendants limit themselves to exposing plaintiffs' counsel's major misrepresentations made in the course of falsely asserting that defendants' counsel supported the reasonableness of plaintiffs' counsel's fee request and the most

outrageous of plaintiffs' counsel's attempt to slander Mr. Grosfeld.

Plaintiffs' counsel seek to prejudice this Court by asserting that defendants' counsel supported the reasonableness of plaintiffs' fee application in the district court. Plaintiffs' counsel know that assertion is false because they were present at those conferences.

In support of their assertion, plaintiffs' counsel now assert that defendants not only failed to deny making such a statement after the court supposedly referred to defendants' statements during hearings held on March 31 and April 25, 1997, but also that defendants actually said that "a fee of one third the gross amount of the fund would be well within the range of reasonable", "perfectly reasonable". (PB at 24, 32-33)

Plaintiffs' entire argument is a fabrication. As shown below, defendants' counsel did not make the statement attributed to them. (R132-1518 at 42; R133-1535 at 25-26) *Plaintiffs' counsel's quotation of defendants' statement are not defendants' words.* Plaintiffs' counsel proceed to argue that defendants' silence at the April 25, 1997 cost hearing constituted an admission of statements supposedly made by the court about defendants' alleged support of plaintiffs' counsel's fee. In fact, the court made no statement about defendants' supposed support of plaintiffs' counsel's fee at the April 25 hearing.

Plaintiffs' counsel's assertion that defendants did not deny that they made a statement in support of plaintiffs' counsel's fee in the district court after the district court's statement of March 31, 1997 is also false. Defendants filed an affidavit in the district court which stated: "I made no statement relating to plaintiffs' counsel's fee. I submitted no material which addressed counsel fees." (R35-1546 (Dodyk Decl. at ¶ 6)) Not only did defendants deny making any statement in support of plaintiffs' counsel's fees during the week of January 26, 1997, plaintiffs' counsel never asserted that such a statement had been made until *after* the court inserted its unfortunate

comment in its May 8 opinion. Moreover, Mr. John Cooper, one of plaintiffs' counsel, submitted an affidavit which actually purported to describe what defendants' counsel had said at the January 28, 1997 conference when defendants' statement was allegedly made. That affidavit does *not* assert that defendants' counsel made any statement about plaintiffs' counsel's fee application. Since that affidavit was submitted to support plaintiffs' counsel's exorbitant fee application, it is inconceivable that Mr. Cooper would not have claimed that the statement had been made if defendants had made it.

In service of their effort to prejudice this Court, plaintiffs' counsel accuse defendants of calling the district court a "liar". (PB at 3-4) *That is false*. While defendants strongly believe that the district court erred in stating that defendants spoke in support of plaintiffs' counsel's fees, defendants have consistently expressed that view in the most respectful fashion. (DB at 33) Defendants believe that the most likely explanation of the district court's error is that the court was confused by statements which were made *by plaintiffs' counsel* in an ex parte conference held (with defendants' consent) on January 28, 1997 at which defendants were not present.

Plaintiffs seek further to prejudice this Court by repeating their baseless mantra that MOI, a recognized and duly licensed commodity dealer with hundreds of brokers, thousands of customers and millions of dollars in revenue, was a "telemarketing boiler room". The best evidence of plaintiffs' counsel's convictions is the fact that they settled a claim they valued at over $200,000,000 (with prejudgment interest) for a class distribution of $6,450,000. They did so only after the district court expressed its doubts at the jury instruction charge conference: "I don't think the weight of the evidence is necessarily in plaintiffs' favor on the pervasiveness of these things". (R120-1433 at 7845) They did so because after five months of trial, they had become concerned that there might be a "defense verdict" and concluded "it's possible two weeks

from now we'll have nothing further for the [plaintiffs]". (R126-1442 at 8294, 8298)

ARGUMENT

I. THE FACTS THAT PLAINTIFFS' COUNSEL'S FEE AWARD OF $13,333,333 IS 200% OF THE ACTUAL DISTRIBUTION OF $6,450,000 AND 400% OF THE FEES AWARDED IN PRIOR ELEVENTH CIRCUIT CASES ARE PROVEN OF RECORD.

The most important fact on this appeal is that the Fee Award of $13,333,333 in this case is more than 200% of the actual class distribution of approximately $6,450,000. (R32-1481 at Ex. A, Table 12b) The most important consideration leading to the conclusion that the district court abused its discretion in making that Fee Award is that the award is so much greater than fee awards made in other cases in this Circuit. The district court relied on the NERA Study as the "only evidence before the Court from which a benchmark might be selected" and noted the average fee in the NERA Study cases was 29.92% of the total settlement. (*Id.*) The NERA study plainly does *not* support the district court's Fee Award. Indeed, the Fee Award in this case of $13,333,333 is *one third (33%) of the total fee awards* ($49,998,375) in all of the 29 Eleventh Circuit cases studied by NERA, while the class distribution of $6,450,000 is *only 3.8% of the total settlements* ($168,352,500) in those 29 cases. (*Id.*)

The district court erroneously adopted the misleading comparisons in plaintiffs' counsel's Fee Application and applied its 33.33% to the nominal settlement amount of $40,000,000, rather than the projected actual distribution. When defendants attempted to point out that error to the court, the court refused to consider the disparity between its Fee Award and the awards in the prior cases. That refusal lies at the heart of the district court's abuse of discretion.

Plaintiffs' brief fails to provide any justification for that disparity. Indeed, plaintiffs' counsel never once refer to the amount of their Fee Award or the class distribution in this case. Plaintiffs would have this Court ignore that disparity, claiming that there is no support in the record for the fact that "the fee award in this case is 400% greater, relative to actual distributions" than the awards in the 29 Eleventh Circuit cases studied by NERA. (PB at 4) *That statement is false*. The amount of plaintiffs' counsel's Fee Award ($13,333,333) is a matter of record. (R132-1518 at 94) The amount of the actual distribution ($6,450,000) is a matter of record. (R35-1563 at 13)[2] The NERA Study is a matter of record. (R32-1481 at Ex. A; R31-1444) The NERA Study shows *on its face* that fees awarded in prior Eleventh Circuit cases were 29.92% of the total settlement amounts. (R32-1481, Ex. A at Table 12b)

Plaintiffs' counsel's only rebuttal is their unsupported assertion that the NERA Study does not mean what it says, and, implicitly, that the actual distributions in the NERA Study cases were in fact much lower than the settlement amounts shown. Plaintiffs' counsel point to no evidence in the district court or this Court to support their claims that the settlement amounts in NERA cases were not actually distributed. Defendants reviewed all of the documents in the 29 cases studied by NERA and submitted an affidavit to the district court to establish that the settlement amounts in those cases were in fact actually paid to the class and to counsel. (R34-1528) That affidavit established that 16 of the 29 cases were pro rata settlements, meaning that the entire settlement amounts were distributed as fees, expenses and distributions. (*Id.* at ¶ 14(a)) That statement was based on the affiant's personal examination of the relevant court documents. The affidavit went on to state that the affiant had contacted counsel of record

---

[2] Because defendants' motion to supplement the record under Fed. R. App. P. 10(e) with the Final Report of the Settlement Administrator was denied, defendants rely on an earlier version of that Report, which then calculated the actual distribution to be $6,485,362. (*See* DB xviii, p. 2)

in the remaining 13 cases and was advised that all of the funds reflected in the settlement amounts in those cases had in fact been distributed. (R34-1528 at ¶ 14(b))

That submission was clearly sufficient to place of record the fact that the settlement amounts shown in the NERA Study were actual distributions. Given that showing, the district court should have determined whether its Fee Award was in fact based on a misconceived comparison of the purely nominal settlement fund in this case with the actual distributions in the NERA cases. If the district court had any doubts about defendants' showing, it should have held an evidentiary hearing informed by the adversary process.

Rather than holding an evidentiary hearing, the district court placed an ex parte telephone call to someone at NERA and satisfied itself that NERA never "*considered*" whether the settlement amounts studied were actually distributed. (R35-1544 at 3-4) Plaintiffs' counsel asserts that the author of the NERA Study "contradicted" the representations that defense counsel had made concerning the Study. (PB at 33) *That is false*. All that NERA told the district court was that NERA obtained the settlement amounts from court-filed documents. (R35-1544) NERA did not tell the district court whether those amounts were actually distributed or not. NERA's statement to the court in no way contradicted defendants' statement that these settlement amounts were in fact distributed to class and counsel. The fact that NERA did not "consider" whether the settlements were actually paid out is irrelevant. *The point is that the settlement amounts were in fact distributed.* In short, the controlling facts—the Fee Award of $13,333,333 is over 200% of the actual distribution of $6,450,000 and over 400% of prior Eleventh Circuit precedent studied by NERA—are all proven by record evidence.

II. THE COURT'S DECISION IN THIS CASE IS NOT CONTROLLED BY THE BOEING OR CAMDEN DECISIONS; THE CASE LAW ESTABLISHES THAT CLASS COUNSEL'S FEES SHOULD BE BASED ON ACTUAL, NOT NOMINAL, CLASS DISTRIBUTIONS.

Plaintiffs' assertion that this Court's decision is controlled by the *Boeing* and *Camden* decisions is untenable. Their claim that "the Supreme Court [in *Boeing*] *held* that class counsel's fee award should be measured by the size of the common fund . . . and not merely by the value of the claims . . . asserted" is plainly wrong. (PB at 38 (emphasis supplied)) All the Supreme Court held is that allocating some portion of whatever fee is awarded against nonclaiming class members is not precluded by the American rule against fee-shifting. *Boeing*, 444 U.S. at 476-77. *Boeing* does not decide or discuss what fee should be awarded to class counsel; it takes the fee award as an assumption. *Boeing* is a *fee allocation* decision, not a *fee award* decision. Moreover, the Supreme Court limited its fee allocation ruling only to cases in which the defendant's liability was not contingent upon the number of claims presented:

> "Thus, we need not decide whether a class-action judgment that simply requires the defendant to give security against all potential claims [*e.g.*, a reversionary settlement] would support recovery of attorney's fees under the common fund doctrine." *Id.* at 480, n.5

Three courts have ruled that *Boeing* does not mandate disregard of actual distributions. *See Wise* at 982, *Strong* at 852, *Goodrich* at 1996 WL 76161 at * 2:

> The [court's] order limited the fee awarded to one-third of the benefits actually delivered to class members. The *Boeing* case does not, in my opinion, require or suggest that that approach was erroneous.

Plaintiffs' counsel's suggestion that this Court's decision is controlled by its decision in *Camden I* misstates the holding of that case. *Camden I* does not suggest that the district courts may disregard the actual distribution in a reversionary case. *Camden I* held only that courts in this Circuit should follow the percentage of fund rather than the lodestar approach in awarding class counsel fees:

> "The dispositive issue in this appeal is whether such fee should be based upon a percentage of the fund or the lodestar computation method." 946 F.2d at 771

The *Camden* Court did not even consider whether the amount of the fee should be based on the nominal settlement amount or the actual distribution. The Court ruled that class counsel's fee should be a "reasonable" percentage of the common fund. *Id.* at 774. The "common fund" may be a pro rata fund or a reversionary fund. To determine a reasonable fee under *Camden* in a consistent manner, the fee must be based upon actual class distributions regardless of whether the fund is a reversionary or pro rata fund. Any other result will encourage the manipulation of reversionary settlements to produce exorbitant attorneys' fees to the detriment of the class.

This Court's comments concerning the reversionary settlements were limited to the observation that charging the fee against the fund did not violate the American rule against fee-shifting in a reversionary case—a position which defendants have not taken in this case. 946 F.2d at 771, n.2 Defendants argue only that actual distributions should be controlling in awarding counsel fees in a reversionary settlement, *as they necessarily are in a pro rata case*, and that the Fee Award in this case is an abuse of discretion. That is a question of first impression in this Circuit and this Court's decision is not controlled by either *Camden I* or *Boeing*.

The remainder of plaintiffs' cases are irrelevant. (PB at 44) *Skelton v. General Motors Corp.*, 860 F.2d 250 (7th Cir. 1988) is a lodestar case, not a percentage of fund case, as is *Rosenfeld*

v. Collins & Aikman Corp., 1989 WL 150926 (E.D. Pa. December 13, 1989). In *Koppel v. Wien*, 743 F.2d 129 (2d Cir. 1984), the court held only that the district court had erred in finding that plaintiffs' counsel had conferred no benefit on the class. No challenge was raised to the court's definition of the settlement fund in *In re Crazy Eddie Securities Litig.*, 824 F. Supp. 320 (E.D.N.Y. 1993) and the court did not decide that issue. As defendants have shown, *Williams v. MGM-Pathe Comm. Co.*, 129 F.3d 1026 (9th Cir. 1997) is a cryptic per curiam opinion, which is of no precedential value because plaintiffs' counsel was unopposed.

Plaintiffs' counsel proceed to argue that "none [of defendants' cases] suggests that district court must, or even should . . . award only a percentage of the actual claims received". (PB at 52) That statement is flatly inconsistent with *all* of the cases cited by defendants. In their initial brief, defendants quoted the relevant language holding that actual distributions, not nominal settlement amounts, are to be used from *Strong v. BellSouth Telecomm. Inc.*, 137 F.3d 844, 851-52 (5th Cir. 1998); *Wise v. Popoff*, 835 F. Supp. 977, 981 (E.D. Mich. 1993); *Lyons v. Scitex Corp.*, 987 F. Supp. 271, 279 (S.D.N.Y. 1997); and *Goodrich v. E.F. Hutton Group, Inc.*, No. 8279, 1996 WL 76161 at * 3 (Del. Ch. February 2, 1996). (DB at 42-43) For example: "The Court determines that a more reasonable fee results from calculating a percentage of the actual recovery". (*Wise,* 835 F. Supp. at 981) In *all* of the following cases, the courts expressly based their fee awards on the courts' determination of the actual value of the class distribution and rejected some higher estimate of the settlement fund advanced by plaintiffs' counsel. *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 572, 588-89; (D.N.J. 1997), *vacated in part on other grounds*, 1998 WL 409156 (3d Cir. 1998); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 989 F. Supp. 375, 378-380 (D. Mass. 1997); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 348-51 (N.D. Ga.

1993); *Bowling v. Pfizer, Inc.*, 922 F. Supp. 1261, 1283-84 (S.D. Ohio 1996).

Plaintiffs' counsel fail to cite any federal cases which hold that the district courts should disregard the amount of actual distributions, apart from the *Williams* case discussed above.[3] Indeed, the case principally relied upon by plaintiffs, *In re Copley Pharmaceutical Inc., "Albuterol" Products Liability Litig.*, 1 F. Supp.2d 1407 (D. Wyo. 1998), is yet another case in which the court *rejected* plaintiffs' counsel's attempt to base its fee on a nominal settlement fund ($150,000,000) because the actual distribution would be less.

> "Finally, the Court considers it highly relevant that payments to claimants will most likely only amount to $75 million, well under the $150 million upon which the Court based its calculations . . . . The Court believes this consideration of the actual benefit to the class is necessary, lest counsel receive a fee disproportionate to the actual benefit bestowed on the class . . . ." (*Copley* at 1415)

To defendants' knowledge, this is the first case in which defense counsel has exposed for judicial review the manipulation by plaintiffs' counsel of the reversionary form of class action settlement to reap exorbitant fees at the expense of the class. These manipulations are typically shielded from judicial review by one-sided representations by plaintiffs' counsel, which are insulated from appellate review by collusion or aggressive misapplication of "clear-sailing" provisions.

---

[3] The *only* other case cited by plaintiffs which chooses a nominal fund is an opinion of the Alabama courts, *City of Ozark v. Trawick*, 604 So,2d. 360 (Ala. 1992).

III. AWARDING CLASS COUNSEL FEES WHICH ARE TWICE THE AMOUNT OF THE CLASS RECOVERY BRINGS DISCREDIT UPON THE COURTS AND THE BAR.

Plaintiffs' counsel simply fail to address the fundamental question raised on this appeal: whether the district court's Fee Award of over 200% of the actual distribution and 400% of Eleventh Circuit precedent is an abuse of discretion on the facts of this case. Instead, plaintiffs' counsel attack a series of "straw-man" arguments which defendants never made. Contrary to plaintiffs' counsel's arguments, defendants do not argue that a district court *must* give *no* consideration to the aggregate amount of a settlement fund in *any* reversionary case. (PB at 40, 49) It is plaintiffs' counsel who argue that *no* consideration should be given to the actual distribution. While there may be reasons to give some consideration to the amount of the nominal settlement fund in some reversionary settlements, that would surely be a rare case, distinguished by some highly unusual circumstance. Nor do defendants suggest that "class counsel 'should have' negotiated . . . a pro rata settlement". (PB at 46-47) Defendants argue that there is no justification for awarding fees which are over 400% of the amounts which would be awarded in a pro rata case.

The district court's abuse of discretion implicates a basic legal question; namely, whether the fact that this case involves a reversionary settlement justifies a fee award which is four times what counsel would receive in a pro rata case relative to the actual distribution. In a pro rata distribution, class counsel's fee is necessarily tied to the actual distribution because the entire "fund" is distributed to the class and class counsel. In a reversionary fund, the actual distribution is almost always a minor fraction of the fund because most class members do not file claims. Why should plaintiffs' counsel receive a fee of $13,333,333 for producing a distribution of $6,450,000 while counsel in a pro rata case would have to achieve an actual class distribution of $31,229,945 to earn a fee of $13,333,333 under

the criteria applied in 29 Eleventh Circuit cases studied by NERA? (*See* DB at 45)

Plaintiffs' counsel and the *amicus* brief filed by the AARP[4] offers absolutely no response to defendants' demonstration of the pernicious consequences which flow from awarding plaintiffs' counsel a fee based on the nominal settlement amount in a reversionary case. (DB at 48-52) They do not deny that such awards create perverse incentives to negotiate settlements which create large nominal settlements and large fees at the expense of the class. They do not deny that such fee awards create conflicts of interest between the class and their counsel which lead counsel to adopt reversionary settlements, to adopt procedures which reduce the number of authorized claimants, and to file exorbitant fee applications to the detriment of their class.

Plaintiffs' counsel offer absolutely no reason why class counsel in reversionary settlements should be awarded fees which are so disproportionate to the actual class payout. Plaintiffs' brief goes so far as to suggest that they would be entitled to request a fee of 50% of the common fund, which would create a $20,000,000 fee and a $5,000,000 class payout. Plaintiffs' counsel's claim that fees based on actual payouts would deter the filing of meritorious class actions is untenable. (PB at 59) Allowing attorneys' fees that exceed the actual class payouts will only encourage more spurious class actions. Contrary to the urging of the AARP and plaintiffs' counsel, meritorious class actions do not require such exorbitant fee awards. As the court's docket will attest, there are legions of lawyers prepared to take such cases based upon a fee tied to the actual results produced. The only reliable measure of the "merit" in a class action claiming financial damages is the

---

[4] The AARP brief is falsely premised on the belief that defendants "renege[d] on the attorneys' fee portion of the negotiated settlement to which they agreed". (AARP Brief at 25) As indicated above, defendants had no attorneys' fee agreement.

amount of the actual class distribution. Additionally, basing the fee award upon actual distributions will streamline the court's role in setting fees. There is no policy reason to provide an incentive for bringing class actions which result in legal fees which are twice the amount of the actual class distribution. To the contrary, such lawsuits should be discouraged. They waste judicial resources and bring discredit upon the bar, the courts and the profession. As the Second Circuit held in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 469-470 (1974):

> "Unfortunately, there has been more than a little justification for the dissatisfaction of the lay community with the application of the equitable fund doctrine under Rule 23. . . . In *Illinois v. Harper & Row Publishers*, 55 F.R.D. 221 (N.D. Ill. 1972), the District Court observed that:
>
> > If Rule 23 is to be preserved against deserved criticism, some attempt must be made by the court to suit the award of the fees to the performance of the individual counsel in light of the size of the settlement. Otherwise, the attorneys who are taking advantage of class actions to obtain lucrative fees will find themselves vulnerable to the criticism expressed in the Italian proverb, 'A lawsuit is a fruit tree planted in a lawyer's garden.'
>
> * * * *
>
> For the sake of their own integrity, the integrity of the legal profession, and the integrity of Rule 23, it is important that the courts should avoid awarding 'windfall fees'. . . . The award must be made with an eye to moderation and, if for no other reason but to allay suspicion, the court should typically take pains to allow a complete airing of all objections to a petitioner's fee claim."

IV. PLAINTIFFS' COUNSEL'S CONDUCT IN THIS CASE DOES NOT WARRANT THE DISTRICT COURT'S UNPRECEDENTED FEE AWARD.

There is nothing about this case which can justify a fee so far outside the limits of prior decided cases. The district court did not consider the recovery unusually beneficial to the class. (R132-1518 at 92) Indeed, the class distribution of $6,450,000 is 5.37% of the alleged investment loss of $120,000,000, as compared to an average of 6.7% in the 29 Eleventh Circuit cases studied by NERA.[5] (R32-1481 at Ex. A, Table 12b) The district court accurately described the meager information supplied concerning their efforts, limited to the aggregate number of hours spent valued at 1997 rates, as a "dearth of information". (R132-1518 at 88)

Plaintiffs' counsel's only attempt at justification of their unprecedented Fee Award is a brief repetition of the *Johnson* factors recited by the district court, specifically:

- "abnormally high" expenditure of time and effort due to novelty and complexity of the issues and the unusually aggressive defense
- required a higher degree of skill than the average class action
- the contingent nature of the case created a substantial risk for class counsel
- class counsel were the only counsel who expressed a desire in prosecuting their difficulties (PB at 59-60)

All of these justifications are premised on the district court's view that this was a "well conceived class action". If this was not a well conceived class action, plaintiffs' counsel's investment of skill and effort and their assumption of risk should not be rewarded. The fact that no other counsel was

---

[5] *See* note 1 *supra.*

interested in bringing this action is neither surprising nor a basis for an award of counsel fees.

This case should never have been brought or allowed to proceed as a class action. Defendants have demonstrated that this case was no more than an overblown churning case in which liability necessarily depended on the proof of oral communications between 800+ brokers and 20,600 purchasers over a five-year period. (DB at 14-16) Plaintiffs' allegations of "high pressure telemarketing" do not allege a *common core* of operative fact *causing* actionable damage, which is the *sine qua non* of any class action. (DB at 16) The district court transformed plaintiffs' individual churning claims into a class action by eliminating the universally recognized requirements of reliance and transaction causation from the Florida Securities and Investor Protection Act ("SIPA") claims, as well as the defense of comparative negligence. All three of these rulings were erroneous. (DB at 16-20) The court's rulings on reliance and transaction causation were rendered in conscious disregard of controlling authority. (DB at 16-20) This was most clearly not a "well conceived class action".

Plaintiffs' counsel make no attempt to defend their conduct below or the district court's rulings. Plaintiffs cannot avoid consideration of these questions by arguing that defendants are improperly seeking review of interlocutory decisions merged in the settlement. (PB at 5) Defendants do not seek reversal of those rulings. Defendants seek appellate review of an unprecedented and exorbitant Fee Award made on the grounds that this was a "well conceived class action". If the district court converted this case into a class action by improperly eliminating the requirements of reliance and transaction causation, the district court's Fee Award cannot be affirmed on the grounds that plaintiffs' counsel brought a well conceived class action.

Plaintiffs' counsel seek to justify their Fee Award on appeal by claiming it is warranted by their lodestar. That claim

is barred at the outset because they made no meaningful lodestar presentation below. They submitted only their aggregate hours valued at 1997 rates—a submission which the district court accurately criticized as supplying a "dearth of information". (R132-1518 at 88)

More importantly, the ultimate measure of the value of these efforts is the actual distribution it produced: $6,450,000. The fact that plaintiffs' counsel may have squandered seven years of judicial time and five months of trial time in producing that result is no grounds for a fee award which is so disproportionate to the result produced. Under the Private Securities Litigation Reform Act ("PSLRA"), federal courts do not even have the power to award *fees or expenses* in excess of a reasonable percentage of the amounts actually paid out. (DB at 3) The policy reflected in that Act is applicable to this case.[6]

As importantly, the fact that plaintiffs' counsel did not bring this case to a resolution by settlement long ago, as is typical in these cases, is attributable to their actions alone. That is conclusively proved by three facts:

(1) Plaintiffs' counsel do not deny that they never receded from their early settlement demand of $90,000,000 in a case in which the alleged investment loss was $120,000,000 until the evening of January 26, 1997. (DB at 20, 27)

(2) On the eve of closing argument, plaintiffs' counsel settled this case for an actual distribution of $6,450,000.

---

[6] Plaintiffs' counsel argue that the PSLRA's limitation on attorneys' fees should be limited to some undescribed type of case which they refer to as "plaintiff strike suits". (PB at 5-6) The fee limitation of the PSLRA is applicable to all securities actions. The policy of the PSLRA is fully applicable to this case. The fact that this case involves commodity options rather than stock options is no reason for distinction.

(3) Defendants offered $3,000,000 to settle this case in 1995, over two years before trial. (R35-1539 at ¶ 5.a)

These facts demonstrate that plaintiffs' counsel's expenditure of their time, and their squandering of judicial resources, is due solely to their intransigent settlement tactics.

The suspension of the rules of law below has already inflicted over $20,000,000 of wholly unjustified injury upon Mr. Grosfeld, who was held in this case only by reason of his ownership of MOI's indirect parent and his ability to fund the financial aspirations of plaintiffs' counsel. (*See* DB at 43, 55-56) That injury was deliberately inflicted by plaintiffs' counsel, who urged the district court to proceed with a class action which should never have been brought and which was sustained only through a series of plainly erroneous rulings secured by plaintiffs' counsel below. To add to that injury by affirming the district court's abuse of discretion would surely make a mockery of any claim that Mr. Grosfeld has been afforded the protection to which he is entitled by the applicable rules of law.

V. THE CLEAR-SAILING AGREEMENT IN THIS CASE IS NOT A "FEE AGREEMENT", "NEGOTIATED FEE CAP" OR ANY OTHER TYPE OF FEE AWARD AGREEMENT AND DOES NOT INSULATE PLAINTIFFS' COUNSEL'S EXORBITANT FEE FROM APPELLATE REVIEW.

Plaintiffs' counsel seek to shield their self-interested manipulation of the reversionary settlement from review by misinterpreting a narrowly drafted "clear-sailing" provision of the Stipulation to bar appellate review of the district court's abuse of discretion. The Stipulation provided that "plaintiffs' class counsel shall apply for fees in an amount not to exceed 33⅓% of the Settlement Fund plus their costs and expenses". (R31-1371 at 47-48) The clear-sailing provision stated only that defendants will not "directly or indirectly oppose Plaintiffs'

Class Counsel of Record's application for fees and expenses . . . ." (*Id.* at 55)

The Stipulation was not a "negotiated fee cap" because under a negotiated fee cap, the settlement is void if the court sets a fee exceeding the cap. Here, the settlement remained binding irrespective of the court's fee decision. The Stipulation here is not a "fee agreement" because such an agreement is an agreement to a specific fee and the court's award of that fee. No such agreement was made here. Here, *plaintiffs* agreed to submit a fee application not to exceed 33⅓% of the Settlement Fund. This language does not state or imply that *defendants* agreed to any fee award. *Defendants* agreed not to oppose plaintiffs' class counsels' application to the district court for fees and expenses. *Simply put, defendants agreed only to remain silent while plaintiffs made their fee and expense application to the court.* That is not a fee agreement. Furthermore, that limited agreement cannot be construed to permit plaintiffs to demand defendants' silence while they improperly submit a misleading fee application claiming a $40,000,000 "recovery" and a clearly deficient one-page expense application for $2,586,611. While defendants understood that the district court would make a fee award, they did not agree to an award in any amount, much less one which would constitute an abuse of discretion by the court.

As plaintiffs' counsel admit, every line of the Stipulation was arduously negotiated over a five-month period by plaintiffs' counsel who claimed to be experts in class action litigation. (PB at 19, R32-1480 at ¶ 2) The provisions relating to plaintiffs' counsel fee, including the limited clear-sailing provision, were the most important part of the Stipulation bearing on plaintiffs' counsel's compensation. It is inconceivable that plaintiffs' counsel would have neglected to set forth in careful detail the precise terms of any fee award which they had agreed to with defendants. The clear-sailing provision was specifically and deliberately limited to plaintiffs' *application* before the district court which, as plaintiffs

concede, reflects that defendants had the upper hand in the settlement negotiations. Given the district court's prior rulings, defendants were not about to make any agreement which would surrender defendants' right to appellate review of the district court's abuse of discretion.

Recognizing that the language of the clear-sailing provision does not support their attempt to block appellate review, plaintiffs' counsel consistently mischaracterize the Stipulation by claiming it is a "*fee agreement*", or a "*negotiated fee cap*" or an agreement "not to *object* to a fee of up to one-third of the gross settlement fund plus expenses in return for plaintiffs' agreement not to request a larger fee," and that defendants seek "*rescission*" of a "*negotiated cap* on class counsel's fee"—all without any record citations. (PB at 1, 2, 21, 25, 54) Plaintiffs also claim, without any record support, that they reduced their fee demand from 50% to 33⅓% of the nominal fund and that this constitutes a fee agreement. Plaintiffs' promise to limit its fee request to 33⅓% of the nominal fund was of no value to the defendants. The suggestion that defendants sought to prevent plaintiffs' counsel from claiming a $20,000,000 fee in what would have been a $5,000,000 settlement is laughable.

As shown above, the Stipulation was not a fee award agreement. Rather, it provided that plaintiffs' counsel would apply to the court for their fee, defendants would not "oppose" that "application", and the court would set the fee within the limits of its discretion. It did not say that defendants waived their right to appeal or committed themselves to endure whatever abuse of discretion the district court chose to inflict. Any such extension of the plain language of the clear-sailing provision would be contrary to public policy because it would destroy the adversary process and leave parties subjected to an abuse of discretion without any remedy.

When plaintiffs' counsel submitted their cost application, defendants were confronted with an application which

submitted a single sheet of paper in support of $2,581,611 in expenses, and a fee application which misleadingly compared the nominal settlement fund in this case with actual distributions in other cases and described the settlement as "unprecedented" , "spectacular" and "historic." (DB at 57) To protect themselves against those misrepresentations, defendants filed a response which was carefully limited to correcting these misrepresentations and pointing out the applicable rules of law, including the fact that *Boeing* did not mandate disregard of the actual distributions to the class, as plaintiffs' counsel asserted. (PB at 38-44) Defendant did not "oppose" plaintiffs' counsel's fee application by suggesting to the district court what fee it should award within the scope of its discretion.

Similarly, before this Court, defendants seek only protection against an abuse of discretion. At the district court, plaintiffs' counsel used the clear-sailing agreement for an improper purpose—to insulate their misleading and deficient fee and cost applications from serious judicial review. Now plaintiffs seek to use the same clear-sailing agreement to preclude defendants from appealing to this Court the abuse of discretion involved in the fee award. Defendants never surrendered their right to have this Court's review of whether the district court properly exercised its powers in setting the fee.

Wholly apart from defendants' interests, this Court has the power *sua sponte* to review the Fee Award and an institutional responsibility to ensure that the award is not excessive. *See* the Second Circuit's opinion in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 468 (2d Cir. 1974). As defendants demonstrated in their initial brief, plaintiffs' counsel's exorbitant Fee Award had the result of reducing the distribution to the class by over $1,000,000, compared to what the class would have received if the district court had followed the criteria applied by the NERA Study cases. (DB at 45-47)

Moreover, the class notice provided no fair warning that plaintiffs' counsel would seek a fee of $13,333,333 irrespective of the class distribution. The notice provided no hint that the Fee Award might be greater than the class distribution and might itself reduce the class distribution by as much as 40%. (DB at 35) The impact of the district court's Fee Award on the class is itself sufficient reason for this Court to review plaintiffs' counsel's successful attempt to manipulate this reversionary settlement to the detriment of their clients.

VI. PLAINTIFFS' COUNSEL'S ASSERTION THAT DEFENDANTS SUPPORTED THE REASONABLENESS OF PLAINTIFFS' FEE APPLICATION IN AN OFF-THE-RECORD HEARING TO THE COURT IS FALSE.

The most outrageous of plaintiffs' counsel's many deceptions is their attempt to claim that defendants' counsel supported the reasonableness of plaintiffs' counsel's exorbitant fee request in an off-the-record conference with the court during the week of January 26, 1997—a fact which they know to be untrue because they were present.

In their initial brief, defendants demonstrated that the court's assertion that defendants had made a statement to the court supporting the Fee Award was not supported by anything in the record and was wildly implausible. (DB at 33-36) Defendants pointed out that their support of plaintiffs' counsel's fee was not necessary to secure approval of the settlement (indeed, it was counterproductive) and contrary to the financial interests of their clients. Plaintiffs' counsel made no response to defendants' demonstration of implausibility. Defendants also pointed out that plaintiffs' counsel never submitted an affidavit claiming that such a statement had been made or even argued the point at any time before the district court filed its opinion of May 8, 1997.

Plaintiffs' counsel now seek to persuade this Court that defendants made such a statement by a series of demonstrably

false assertions. *First*, they assert that defendants' counsel actually made such a statement at the Fairness Hearing on March 31, 1997. They assert:

> Defendants' counsel, when asked about the fee, assured the district court that "a fee of one third the gross amount of the settlement fund would be well within the range of reasonable," "perfectly reasonable" (PB at 24; *citing* R132-1518 at 42 [Transcript of March 31, 1997]; R133-1535 at 26; *see also* R35-1544 at 4))

Plaintiffs' counsel carefully crafted that statement to give this Court the impression that defendants' counsel was asked about plaintiffs' counsel's fee at the March 31, 1997 Fairness Hearing and said in response to the district court that a "fee of one-third of the gross amount of the settlement fund would be well within the range of the reasonable", "perfectly reasonable". *That is false*. Review of page 42 of the March 31, 1997 transcript will reveal that (1) the quoted words were not spoken by defendants' counsel; (2) defendants' counsel was not asked any questions and did not speak about the reasonableness of the fee at p. 42 of the March 31, 1997 Fairness Hearing, or any other point during that Fairness Hearing, or at any other time; and (3) the quoted words "perfectly reasonable" do not even appear in that transcript. The words "perfectly reasonable" are words which the *court* used on April 25, 1997 in reference to plaintiffs' counsel's *costs*, not their *fee*. (R133-1535 at 26)

Second, plaintiffs' counsel argue that defendants' counsel failed to deny that they had made such a statement after the district court made a passing reference to the alleged statement during the March 31, 1997 Fairness Hearing. (PB at 28) *That is false*. Defendants filed a motion pursuant to Fed. R. Civ. P. 52(b) and 59(e) seeking to amend the court's final order entered after the March 31, 1997 Fairness Hearing. Defendants' counsel filed the affidavit of Paul. M. Dodyk in support of that motion. (R35-1546) That affidavit says in relevant part:

> As Mr. Cooper [Plaintiffs' counsel] admits, my comments before the court during the week of January 26, 1997, were confined to the relationship between the proposed settlement amount and the class members' investment loss. *I made no statement relating to plaintiffs' counsel's fees. I submitted no material to the court which addressed counsel fees.* (R35-1546 (Dodyk Decl. at ¶ 6) (emphasis supplied))

Defendants' counsel clearly denied that they had made any statement supporting plaintiffs' counsel's fee by the means provided by the Federal Rules of Civil Procedure. There is no basis for plaintiffs' counsel's attempt to impugn defendants' veracity on the grounds that they did not leap to their feet to make an objection to a passing comment by the district court in the course of reading its opinion into the record on March 31, 1997. The district court had already made its displeasure with *any* statement by defendants' counsel concerning the Fee Award exceedingly plain. (R132-1518 at 81-86) Defendants had available the remedy provided by Rules 52 and 59 of the Federal Rules of Civil Procedure, which they promptly utilized, and discretion was most definitely the better part of valor under the circumstances.

Third, plaintiffs' counsel assert that defendants tacitly admitted making the alleged statement, by failing to object to a statement supposedly made by the district court at a hearing on April 25, 1997 which was devoted to plaintiffs' *costs* (the Fee Award having been made on March 31, 1997). (PB at 32-33) Plaintiffs' counsel fault Mr. Bonner, defendants' counsel who appeared to handle the expense hearing, because he "was in court *and—once again—did not object to the district court's statement about defendants' prior representations.*" (*Id.*) Plaintiffs' counsel overlook the fact that the court never said anything during the April 25, 1997 hearing about what defendants supposedly said about plaintiffs' fee during the week of January 26, 1997. The court said only: "*it* was represented to me that the fee award sought was well within the

range of common practice in these types of cases". (R133-1535 at 25-26) The court did not say that *defendants' counsel* had made any representation about plaintiffs' counsel's fee. Since Mr. Bonner knew that plaintiffs' counsel had ex parte conversations with the court about their fees during the week of January 26 without defense counsel present, he had absolutely no reason to question that statement.

Plaintiffs' counsel proceed to assert that "the court noted that defendants had earlier agreed that a *fee and expense award* in the amount requested and awarded would be 'perfectly reasonable'". (PB at 32 (emphasis supplied)) *Once again, that statement is false*. The court said only that "I was concerned about the amount of the *costs*, I asked for an estimate at the time. An estimate was put on the table by the plaintiffs. It is pretty much in line with what the costs have ended up being, and everyone thought would be perfectly reasonable". (R133-1535 at 26 (emphasis supplied))

As that quotation makes perfectly clear, the court was talking about costs, not fees. Plaintiffs' counsel's statement that the court had noted that *defendants* had earlier agreed that the *fee award* would be "perfectly reasonable" is therefore blatantly false. (PB at 32) While the court's statement that "everyone" had at some time agreed that plaintiffs' *cost* estimates were "perfectly reasonable" was more than a little odd, given that the only statement made about plaintiffs' counsel's *costs* during the week of January 26 was that they were somewhere "north of $2,000,000", Mr. Bonner's decision not to further agitate the matter cannot be construed as acquiescing in a statement about *fees* that was never made. (R126-1442 at 8268)

Contrary to plaintiffs' counsel's assertions, defendants did challenge the notion that they had supported the reasonableness of plaintiffs' counsel's fees during the week of January 26, 1997 in the district court. Indeed, it is plaintiffs' counsel who failed to assert that defendants had made any statement supporting their fees. During the exchange of affidavits in the

district court, Mr. Cooper, one of plaintiffs' counsel, filed an affidavit which actually attempted to describe what defendants' counsel had said in the settlement conference with the court on January 28, 1997. (R35-1540) Mr. Cooper did *not* say that defendants' counsel said anything about the reasonableness of plaintiffs' counsel's fee application. Since the reasonableness of plaintiffs' counsel's fee was the principal issue addressed by these affidavits, it is inconceivable that Mr. Cooper would not have said that defendants' counsel had made such a statement, if that had happened. In arguing for plaintiffs' counsel's fee, Mr. Cooper apparently felt constrained by the truth. Before this Court, plaintiffs' counsel take a rather different approach.

VII. PLAINTIFFS' COUNSEL SEEK TO PREJUDICE THIS COURT BY A FALSE AND SLANDEROUS ATTACK ON DEFENDANTS AND THEIR COUNSEL.

Plaintiffs' counsel attempt to prejudice this Court by a false and slanderous attack on Mr. Grosfeld and his counsel. The most reliable evidence of plaintiffs' true assessment of the case is their conduct. As plaintiffs' counsel admit, they insisted on $90,000,000 to settle alleged damages of $120,000,000 until January 26, 1997. (R35-1539 at 4, 7, 8, 11) That evening they settled the case for class distribution of $6,450,000. In the weeks prior to the settlement, the court repeatedly expressed its doubts as to the viability of their case. At the Rule 50 hearing on November 26, 1996, the court told counsel they had "just barely" survived defendants' motion to dismiss. (R100-1414 at 4382) At the end of defendants' case on January 16, 1997, the court expressed doubt as to the "pervasiveness" of the alleged practices. (R120-1433 at 7845) Plaintiffs' counsel's claim that they settled on the eve of closing arguments because of their doubt about the validity of the court's legal rulings is a fiction. They were aware of those problems as early as 1993 when the Court certified the class and certainly no later than January of 1996 when the district court read reliance out of the Florida Securities and Investor Protection Act. Indeed, on January 27,

1997, plaintiffs' counsel admitted that they feared a hung jury or a defense verdict. In their brief, plaintiffs concede defendants had the superior bargaining power. (PB at 22, 46) That superior bargaining power resulted from plaintiffs' failure to prove their Alleged Scheme to Churn.

Plaintiffs' settlement reflected the weakness of their proof. Plaintiffs' counsel tried the case without calling a single MOI customer. The evidence was undisputed that MOI offered a legal product at prices set by national exchanges with customers making all decisions for their own accounts, and that during the life of the accounts the class enjoyed hundreds of millions of dollars of profits. (R88-1402 at 2498-99) Plaintiffs' major point—that most customers lost money upon closing their accounts—is an industry-wide reality of trading high risk commodity options. Plaintiffs offered no proof that MOI's customers fared any worse than commodity speculators at any other firm. Plaintiffs' counsel did not even ask any witness whether their Alleged Scheme to Churn existed. (DB at 20-23)

Plaintiffs litigated their allegations over five months, where defendants had an opportunity to meaningfully respond, and settled on behalf of the class for $6,450,000. Unwilling to put this case to the jury, plaintiffs now restate their allegations, including evidence rejected by the district court to which defendants do not have an opportunity to respond due to space restraints, in order to have this Court approve their $13,333,333 fee. Indeed, plaintiffs seek affirmance based on their untested version of the facts even though these facts have no relevance to the important legal issue before this Court. Plaintiffs go so far as to use the internal notes of a young associate attorney regarding possible outcomes of a CFTC action, even though the district court excluded the notes and plaintiffs never called the lawyer/author to testify.

Plaintiffs' counsel claim that the transfer of real estate subsidiaries by MultiVest Inc. to Mr. Grosfeld and the trust for his son in January 1990 constituted a fraudulent transfer. (PB

at 9) In fact, the undisputed testimony proves that these transfers were initiated for legitimate tax purposes before Mr. Grosfeld knew of either the CFTC action or this case. (R90-1404 at 2970-71) Plaintiffs suggest no way in which Mr. Grosfeld's transfer of assets from a corporation he and his son's trust owned into his own name and his son's trust would enable them as the owners of MultiVest to avoid paying any liability arising in this or any other action involving MOI.

Similarly, Mr. Grosfeld's April 23, 1990 transfer of assets into a joint tenancy with his wife was made before Mr. Grosfeld had any knowledge that plaintiffs were about to file their lawsuit. (R90-1404 at 2975) The transfer was made in connection with Mr. Grosfeld's retirement as CEO of Pulte Corporation on the occasion of their tenth wedding anniversary. (*Id.* at 2975-2976)

Most importantly, plaintiffs' counsel neglect to mention the undisputed fact that Mr. Grosfeld personally retained over $50,000,000 at the time of the 1990 transfer which grew to approximately $100,000,000 at the time of trial. (R90-1404 at 2886, 2974, 3009) Since no one had any idea at the time of the transfer in 1990 that any court would some years later transform a churning case into a class action and then repeal the reliance and transaction causation requirements of the Florida Securities and Investor Protection Act in order to create potential class-wide liability, the assets retained by Mr. Grosfeld in 1990 were greater than any foreseeable liability. Lastly, all of Mr. Grosfeld's wealth was earned from sources other than MOI.

Seeking to obscure the fact that Mr. Grosfeld was held in this litigation only because of his status as owner of the indirect parent of MOI, they attempt to portray him as the guiding force behind MOI. Nothing could be further from the truth *as demonstrated by the unanimous testimony of all MOI officers, directors and employees*. During the class period, Mr. Grosfeld was Chairman and CEO of Pulte Corporation. (R85-1399 at

2901) He devoted 95 percent of his time to these positions during the class period. (R114-1439 at 7161)

Mr. Grosfeld visited MOI's main office in Florida only two times during the class period. (R90-1404 at 2923-24) Mr. Grosfeld's occasional phone calls to the company were directed to MOI's senior management. (*Id.* at 2952-53) Contrary to plaintiffs' assertions, there is no evidence that Mr. Grosfeld placed any calls to sales managers or brokers during the class period. Like any majority shareholder, Grosfeld kept track of MOI's progress and received monthly financial statements. (R114-1439 at 7160-62) He was not a MOI officer or director in title or in fact. (R90-1404 at 2913)

Plaintiffs' counsel's attempt to misrepresent Mr. Grosfeld's role is based on a single document, a report prepared before the class period by a consultant, Mr. Selwyn Isakow. (PX 148) Plaintiffs depict the Isakow report as an indictment of MOI and as proof of Mr. Grosfeld's involvement. Plaintiffs' counsel do not disclose that Mr. Isakow was called as a witness and emphatically disagreed with their misleading rendition of his document.

Mr. Isakow testified that he did not believe MOI used any improper or illegal sales tactics and did not believe his report suggested otherwise. (R85-1399 at 1973, 2012-2014) Mr. Isakow testified that he did not conclude that MOI had used unlawful tactics to sell ETOs. (R85-1399 at 1973) He concluded that MOI's "[c]ompliance standards are set to ensure that account executives are not over enthusiastic in their sales pitch". (PX 148 at I-6)

Mr. Isakow explained that the reference to high pressure sales referred not to illegal activity, but to an aggressive sales approach. (R85-1399 at 1853-55, 2007) Mr. Isakow's view of MOI was best evidenced by what he did after he authored his report -- he became the Chairman of MOI's parent company and secured the right to purchase a substantial block of shares

of the company. (R85-1399 at 2003-04; R86-1400 at 2080-81, 2092-93)

Failing in their effort to prove a scheme, plaintiffs rehash the allegations of the NFA and CFTC actions against MOI as a basis for establishing class-wide liability. Neither the NFA action, which named ten brokers, six of whom had been fired prior to the filing of that case, nor the CFTC action form any basis for class-wide liability. Both complaints allege sales practice violations arising from specific conversations with customers, and do not allege any occurrence which could cause damage to any class of MOI customers.

Plaintiffs' counsel's attempt to prejudice this court encompasses a mendacious and slanderous attack on defendants' counsel as well. Space limitations permit only a few examples.

First, plaintiffs' counsel assert that defendants' counsel "instruct[ed] the Settlement Administrator not to use an address locator service" "to minimize the number of claims filed by class numbers". (PB at 26-27) *That is false*. Plaintiffs' citation (R130-1550 at 4-5) is to the transcription of a telephonic hearing on March 10, 1997 which says nothing about defendants' counsel instructing the Administrator to do anything. (*See* R130-1550) Defendants' counsel did not instruct the Settlement Administrator not to use any locator service and there is absolutely no evidence of any such activity.

Second, plaintiffs' counsel accuse Mr. Bonner, one of defendants' attorneys, of forwarding false information to the CFTC. *That is false*. Plaintiffs' counsel cite a December 27, 1989 letter which Mr. Bonner wrote to the CFTC as counsel for MOI. (PX 330) The letter provided information to the CFTC concerning brokers that MOI had suspended or terminated for disciplinary reasons. (*Id.*) There is absolutely no evidence in the record suggesting that the letter was inaccurate in any way.

Third, plaintiffs' counsel states that defendants were cited numerous times for frivolous and contemptuous tactics. (PB at 10) *That is false*. Not one of the orders cited held defendants' counsel in contempt or found their pleadings to be frivolous.

But for space constraints, we could go on. If the Court were to devote the time required to check plaintiffs' counsel's statements against their citations, it would find that they are a continuing stream of falsehoods and distortions.

Most of the statements are not only false, but also irrelevant. What is the relevance of Mr. Grosfeld's asset transfers or Mr. Bonner's CFTC statements to the issues before this Court? None. They are clearly designed for the sole purpose of prejudicing this Court against defendants. They come on the heels of *two* motions to dismiss this appeal which should never have been made, and on the heels of an "Emergency Motion" filed to preclude defendants from disclosing to this Court the fact that the actual class distribution in this case is $6,450,000, and from contesting a statement of the district court which plaintiffs' counsel know is erroneous. (R35-1544) (pp. 7-8, 25-29 *supra*)

VIII. PLAINTIFFS' COUNSEL'S DEFERRED OBLIGATION IS NOT ASSIGNABLE.

Plaintiffs' counsel do not attempt to challenge defendants' proof that the parties to the Stipulation intended that plaintiffs' counsel's deferred obligation would be not assignable. (DB at 65-69) Defendants proved that the only reason that the Stipulation was changed to provide that plaintiffs' counsel would receive a "deferred obligation", rather than the assignable promissory notes issued to the class, was to accommodate plaintiffs' counsel's objective to receive an obligation which was tax deferred and, therefore, nonassignable. Plaintiffs' counsel do not deny that they conceded their prior intent by admitting that the Stipulation would have to be "*revised*" to "*now* provide that plaintiffs'

counsel can transfer or pledge their interest" to give them "*the same flexibility in managing the deferred portion of their payment as has been offered to class members*". (DB at 67-68)

Rather, they argue that this Court is precluded from giving effect to the parties' intentions because their deferred obligation is assignable "as a matter of law" in Florida. *None* of plaintiffs' cited cases support their claim that "contractual rights are freely assignable unless the agreement *expressly* provides otherwise." (PB at 63) *Hall* deals with the question of whether the assignment of contracts for convict labor contravenes public policy. *McLendon* and *Poland* deal with specific assignability provisions of the Florida gaming and insurance laws.

None of these cases provides any basis for plaintiffs' counsel's argument that the assignability of a contract at common law in Florida is not to be determined in accordance with the parties' intentions, as it is in the other 49 states. *See, e.g., Gray v. Andrews*, 192 So. 634, 635 (Fla. 1940); *Orlando Orange Groves Co. v. Hale*, 161 So. 284, 294-5 (Fla. 1935); *Smith, Bell & Hauck, Inc. v. Cullins*, 183 A.2d 528, 532 (Vt. 1962); *Chelsea-Wheeler Coal Co. v. Marvin*, 35 A.2d 874, 876 (N.J. 1944). Accordingly, plaintiffs' counsel provide no reason why this Court should not hold the deferred obligation nonassignable in accordance with the parties' proven intent and plaintiffs' counsel's own prior admissions.

CONCLUSION

Defendants respectfully request that (1) this Court reject plaintiffs' counsel's extreme argument that actual distributions in class action cases be ignored in setting fees in reversionary settlements; and (2) this Court set plaintiffs' counsel's fee award as a reasonable percentage of the amount actually distributed to the class in accordance with the Eleventh Circuit precedents summarized by NERA or the limitation set forth in the Private Securities Litigation Reform Act that "Total attorneys fees and expenses awarded by the Court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." 15 U.S.C. § 77z-1(a)(6).

November 6, 1998

Respectfully submitted,

/s/ Paul M. Dodyk
Paul M. Dodyk
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
Telephone: (212) 474-1000

R. Lawrence Bonner
HOMER & BONNER, P.A.
100 S.E. Second Street
Miami, FL 33131
Telephone: (305) 350-5100

Martin I. Kaminsky
POLLACK & KAMINSKY
114 West 47th Street
New York, NY 10036
Telephone: (212) 575-4700

Attorneys for
Defendants-Appellants

CERTIFICATE OF SERVICE AND FILING

I certify under penalty of perjury that on November 6, 1998, I caused two true and correct copies of the foregoing Reply Brief for Defendants-Appellants to be served via First-Class Mail pursuant to Fed. R. App. P. 25(c) upon:

Neil A. Goteiner, Esq.
FARELLA, BRAUN & MARTEL
235 Montgomery Street
San Francisco, CA 94104

Eric G. Lipoff, Esq.
RARING & LIPOFF
3070 Bristol
Suite 650
Costa Mesa, CA 92626-3072

Ronald B. Ravikoff, Esq.
ZUCKERMAN, SPAEDER, TAYLOR & EVANS
201 South Biscayne Boulevard
Suite 900
Miami, FL 33131

I also certify under penalty of perjury that on November 6, 1998, I caused the original and six true and correct copies of the foregoing Reply Brief for Defendants-Appellants to be filed via First-Class Mail pursuant to Fed. R. App. P. 25(a)(2)(B)(i) to:

The Clerk of the Court
United States Court of Appeals for the Eleventh Circuit
56 Forsyth Street N.W.
Atlanta, GA 30303-2289

Executed this 6th day of November, 1998

_____

Victor F. Caldwell

Supreme Court, U.S.
FILED
APR 2 4 2000
CLERK

(3)

No. 99-1560

IN THE

Supreme Court of the United States

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, individually and as Trustee of the JASON GROSFELD TRUST, MULTIVEST REAL ESTATE, INC., S.S. MELBOURNE, INC. and THE CYPRESS GROUP, INC.,

Petitioners,

v.

WILLIAM WATERS and LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

ERIC G. LIPOFF
RARING & LIPOFF
3070 Bristol, Suite 650
Costa Mesa, CA 92626-3072
(714) 429-2970

C. BRANDON WISOFF
Counsel of Record
NEIL A. GOTEINER
FARELLA BRAUN & MARTEL LLP
235 Montgomery Street
San Francisco, CA 94104
(415) 954-4400

Attorneys for Respondents

159213

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

35600

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in following Supreme Court and Eleventh Circuit precedent permitting class counsel's fee award to be based on the gross amount of the settlement fund, where doing so resulted in a fee award representing a multiplier of only 1.05 on class counsel's actual lodestar investment in this seven-year litigation; where the district court found that defendants' tactics had prolonged the litigation and thereby helped reduce the number of claims filed against the fund; where class counsel conferred a substantial benefit on the class and would suffer a multimillion dollar loss if defendants' approach to fees were taken; where no class member objected to the fee award; where defendants, not class members, stand to receive 90% of the proposed reduction in the fee; where defendants expressly stipulated they had no objection to the fee award and advocated its reasonableness to the district court prior to dismissal of the jury; and where the district court conducted a thorough and independent fee determination and found the fee to be fair and reasonable?

2. Whether defendants should be permitted to appeal from that portion of their settlement agreement in which they expressly stipulated, in return for class counsel capping its fee request, that they would not object to a fee award up to the amount of the cap, where defendants expressly told the district court that the fee award requested was "well within the range of reasonable" and where defendants seek to keep all the benefits of their settlement agreement while simultaneously rejecting all its burdens? [Note: this question would become relevant only if the Court grants review of question No. 1, since the Eleventh Circuit affirmed the district court's fee award on the merits without determining whether defendants should be precluded from appealing their own settlement.]

TABLE OF CONTENTS

	Page
Questions Presented	i
Table Of Contents	ii
Table Of Cited Authorities	iv
Table Of Appendices	viii
Statement Of Jurisdiction	1
Statutes Involved	1
Statement Of The Case	2
A. Introduction and Summary	2
B. The Settlement	8
C. Preliminary Approval of the Settlement and Dismissal of the Jury	10
D. Defendants' Breaches and the District Court's Fairness Hearings	12
E. Defendants' Appeal	16
Reasons Why The Writ Should Be Denied	17
I. The Propriety Of A Particular Fee Award Is A Fact-Bound Decision, Determined On A Case-By-Case Basis And Reviewed Only For An Abuse Of Discretion.	17

Contents

Page

II. There Is No Conflict Among The Circuit Courts Regarding This Court's *Boeing* Decision. 22

III. This Case Presents No Important Issue Of Federal Law. 26

IV. Given The Facts At Bar, This Is A Singularly Inappropriate Case For Review. 28

Conclusion 30

TABLE OF CITED AUTHORITIES

Page

Cases:

Association of Community Organizers for Reform Now (ACORN) v. Edgar, 99 F.3d 261 (7th Cir. 1996) 1

Boeing Co. v. Van Gemert, 444 U.S. 472 (1980) 22, 23, 24, 25, 26

Brooks v. Georgia State Bd. of Elections, 59 F.3d 1114 (11th Cir. 1995) 1

Camden I Condominium Ass'n, Inc. v. Dunkle, 946 F.2d 768 (11th Cir. 1991) 17, 18, 23

Cohen v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 722 F. Supp. 24 (S.D.N.Y. 1989) 27

Donovon v. Penn Shipping Co., 429 U.S. 648 (1977) 1

Evans v. Jeff D., 475 U.S. 717 (1986) 28, 29

Hattaway v. McMillian, 903 F.2d 1440 (11th Cir. 1990) 1

In re Copley Pharmaceutical, Inc. "Albuterol" Prod. Liab. Litig., 1 F. Supp.2d 1407 (D. Wyo. 1998) 28

Cited Authorities

	Page
In re Crazy Eddie Secs. Litig., 824 F. Supp. 320 (E.D.N.Y. 1993)	18
ITT Rayonier, Inc. v. United States, 651 F.2d 343 (5th Cir. 1981)	1
Lake Coal Co. v. Roberts & Schaeffer Co., 474 U.S. 120 (1985)	1
Malchman v. Davis, 761 F.2d 893 (2d Cir. 1985)	29
Meghig v. KFC Western, Inc., 516 U.S. 479 (1996)	27
Nashville, Chattanooga & St. Louis Ry. Co. v. United States, 113 U.S. 261 (1885)	1
Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977)	29
Shores v. Sklar, 885 F.2d 760 (11th Cir. 1989)	1
Six Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301 (9th Cir. 1990)	19, 25
Skelton v. General Motors Corp., 860 F.2d 250 (7th Cir. 1988)	18, 23, 28
Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939)	17

Cited Authorities

Page

Strong v. Bell South Telecomm., Inc., 137 F.3d 844 (5th Cir. 1998) 25

Swift & Co. v. United States, 276 U.S. 311 (1928) 1

Van Gemert v. Boeing Co., 553 F.2d 812 (2d Cir. 1977) 18, 19

Van Gemert v. Boeing Co., 573 F.2d 733 (2d Cir. 1978), *rev'd en banc*, *Van Gemert v. Boeing Co.*, 590 F.2d 433 (2d Cir. 1978), *aff'd*, *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980) 24, 25

Van Gemert v. Boeing Co., 590 F.2d 433 (2d Cir. 1978), *aff'd*, 444 U.S. 472 (1980) 24, 25

Van Gemert v. Boeing Co., 739 F.2d 730 (2d Cir. 1984) 18, 24

Walsh v. Ford Motor Co., 945 F.2d 1188 (D.C. Cir. 1991) 1

Williams v. MGM-Pathe Communications Co., 129 F.3d 1026 (9th Cir. 1997) 24, 25, 28

Cited Authorities

Page

Statutes:

7 U.S.C. § 2(a)(ii) 26

7 U.S.C. § 9(b) 27

7 U.S.C. § 25(a) 27

15 U.S.C. § 77z-1(a)(6) 2, 26, 27

Other Authorities:

2 H. Newberg and A. Conte, *Newberg on Class Actions* (3d ed. 1992) 18, 19, 21

3 H. Newberg and A. Conte, *Newberg on Class Actions* (3d ed. 1992) 22

The Nature and Extent of Telemarketing Fraud and Federal and State Law Enforcement Efforts to Combat It: Hearings Before the Commerce, Consumer and Monetary Affairs Subcommittee of the Committee on Government Operations, House of Representatives, 101st Congress, 2d Session, July 11 and 12, 1990 3

National Futures Ass'n Manual, Vol. 6, No. 2 (as of January 1, 2000) at ¶ 9021, Compliance Rule 2-9 2

TABLE OF APPENDICES

Page

Appendix A — Order Of The United States Court Of Appeals For The Eleventh Circuit Denying Motion Of Appellants For Stay Of Issuance Of Mandate Pending Petition For Writ Of Certiorari Dated And Filed January 24, 2000 ..... 1a

Appendix B — Excerpts From Volume 52 Of Transcript Of Trial Proceedings Of The United States District Court For The Southern District Of Florida Dated January 27, 1997 ..... 2a

Appendix C — Volume 55 Of Transcript Of Trial Proceedings Of The United States District Court For The Southern District Of Florida Dated January 31, 1997 ..... 8a

Appendix D — Excerpts From Transcript Of Fairness Hearing Of The United States District Court For The Southern District Of Florida Dated March 31, 1997 ..... 41a

Appendix E — Excerpts From Transcript Of Status Conference Of The United States District Court For The Southern District Of Florida Dated April 25, 1997 ..... 102a

Appendices

Page

Appendix F — Sealed Amended Findings Of Fact, Conclusions Of Law And Order Of The United States District Court For The Southern District Of Florida Denying Preliminary Injunction Under Fraudulent Transfer Claim Dated July 10, 1995, *Nunc Pro Tunc* For February 21, 1995 ..... 105a

Appendix G — Declaration Of Stephen Senderowitz Regarding Application For Final Approval Of Class Counsel's Attorney's Fees And Costs Dated February 20, 1997 ..... 126a

Appendix H — Declaration Of Neil A. Goteiner In Response To The April 24, 1997 Declarations Of Martin Kaminsky And Paul Dodyk Dated May 5, 1997 And Filed May 6, 1997 ..... 141a

Appendix I — Declaration Of John L. Cooper In Response To April 24, 1997 Declaration Of Paul M. Dodyk Dated May 5, 1997 And Filed May 6, 1997 ..... 156a

Appendix J — Administrative Order Of The United States District Court For The Southern District Of Florida Closing Case Dated And Filed May 8, 1997 ..... 165a

Appendix K — Order Of The United States Court Of Appeals For The Eleventh Circuit Re Motions Dated And Filed November 4, 1998 ..... 166a

Appendices

Page

Appendix L — Brief *Amicus Curiae* Of The American Association Of Retired Persons In Support Of Appellees Dated November 4, 1998 ..... 168a

Appendix M — Brief For Plaintiffs-Appellees Dated October 20, 1998, Corrected November 2, 1998 ..... 200a

Appendix N — Motion Of Plaintiffs-Appellees For Leave To File Supplemental Brief To Address One Mistatement In Defendants-Appellants' Reply Brief Dated November 30, 1998 ..... 294a

Appendix O — Order Of The United States Court Of Appeals For The Eleventh Circuit Denying Appellees' Motion To File A Supplemental Brief Dated And Filed December 22, 1998 ..... 303a

Appendix P — Order Of The United States Court Of Appeals For The Eleventh Circuit Denying Petition For Writ Of Mandamus Dated And Filed April 17, 1996 ..... 304a

Appendix Q — Excerpt From The National Futures Association Manual, Volume Six, Number Two (As Of January 1, 2000) 305a

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondents and plaintiffs below (hereinafter "plaintiffs") respectfully request that the Court deny the petition for writ of certiorari filed on behalf of petitioners and defendants below (hereinafter "defendants").

STATEMENT OF JURISDICTION

Although the Eleventh Circuit affirmed the district court's fee award on the merits, neither the Eleventh Circuit nor this Court has jurisdiction to hear this appeal by defendants from their own stipulation of settlement. Settlement of an action renders the cause moot. *Lake Coal Co. v. Roberts & Schaeffer Co.*, 474 U.S. 120 (1985); *ITT Rayonier, Inc. v. United States*, 651 F.2d 343, 345 (5th Cir. 1981). "[M]ootness is a threshold jurisdictional inquiry." *Brooks v. Georgia State Bd. of Elections*, 59 F.3d 1114, 1121 (11th Cir. 1995). Thus, an appeal of a case which has been settled must be dismissed without consideration of the merits. *Swift & Co. v. United States*, 276 U.S. 311, 324 (1928), quoting, *Nashville, Chattanooga & St. Louis Ry. Co. v. United States*, 113 U.S. 261, 266 (1885) (" 'a decree, which appears by the record to have rendered by consent, is always affirmed, without considering the merits of the cause' "). Where, as here, a party stipulates to a comprehensive settlement, without explicitly preserving a right to appeal a particular issue, there is no right of appeal. *See, e.g., Association of Community Organizers for Reform Now ("ACORN") v. Edgar*, 99 F.3d 261, 262 (7th Cir. 1996); *Walsh v. Ford Motor Co.*, 945 F.2d 1188, 1192 (D.C. Cir. 1991) (Ginsberg, J.); *Shores v. Sklar*, 885 F.2d 760, 762 (11th Cir. 1989). A party cannot stipulate to a judgment, even under protest, and preserve the right of appeal. *Donovon v. Penn Shipping Co.*, 429 U.S. 648, 650 (1977); *Hattaway v. McMillian*, 903 F.2d 1440, 1451 (11th Cir. 1990).

STATUTES INVOLVED

The issues raised by the petition implicate neither any federal statute nor statutory policies. As noted in the Eleventh Circuit opinion below, The Private Securities Litigation Reform

Act of 1995 ("PSLRA") is inapplicable to this case which was brought under the Commodity Exchange Act ("CEA"), involved no securities and was filed long before enactment of the PSLRA.

STATEMENT OF THE CASE

A. Introduction and Summary

This class action arose from the fraudulent sales activities of a South Florida telemarketing boiler room called MultiVest Options, Inc. ("MOI"). MOI, and its parent, International Precious Metals Corporation ("IPMC"), had a long-standing history of serious problems with regulatory authorities, including the Commodity Futures Trading Commission ("CFTC"), the governmental agency charged with regulating commodity sales, and the National Futures Association ("NFA"), the industry's self-regulatory body that works in conjunction with the CFTC. In January 1990, the CFTC sued MOI for company-wide, management supervised fraud in the sale of Exchange — Traded Options ("ETOs"), causing the company to stipulate to a permanent injunction and to go out of business. (RA at 110a-111a, 225a-226a)[1] NFA rules still require any commodity firm employing former salespersons of MOI to adopt "stringent supervision procedures . . . in order to ensure that the improper training [these salespersons] have previously received does not taint their sales efforts on behalf [of their firm]." *National Futures Ass'n Manual*, Vol. 6, No. 2 (as of January 1, 2000) at ¶ 9021, Compliance Rule 2-9, Supervision of Telemarketing Activity. (RA at Q)

James Grosfeld, through a holding company called MultiVest, Inc. ("MVI") owned and controlled 100% of both IPMC and MOI. Numerous documents found in Grosfeld's files document his awareness of, and participation in, the fraudulent practices of his companies. (RA at 225a-233a) Upon filing of the CFTC complaint, Grosfeld fraudulently transferred millions of dollars in assets of the holding company MVI to himself and

---

1. Citations to documents included in Petitioners' Appendix are cited as "PA at ___." Citations to documents included in Respondents' Appendix are cited as "RA at ___."

his minor son without consideration. (*Id.* at 227a) As with most boiler room operations closed by the CFTC, MOI was largely a bankrupt shell having almost no assets to pay customer claims. At the end of the day, MOI lost its customers over $120 million, $100 million of which went to MOI as commissions. (*Id.* at 236a-237a)[2]

This class action was commenced in April 1990 to recover investor losses from Grosfeld. The very day plaintiffs filed their complaint, Grosfeld began transferring over $30 million (later, over $50 million) — without consideration — into a tenancy by the entirety with his wife, an effort which the district court found to be motivated by Grosfeld's "actual intent" to defraud the plaintiff class by leaving them with nothing more than a "paper judgment." (RA at 108a, 114a)

Defendants' assertions that the district court improperly certified a "churning" case, while irrelevant to this fee dispute, are contrary to the record evidence. The problems at Grosfeld's companies were not due to a few salespersons "churning" accounts; they were the result of a management-supervised program of training salespersons to cheat customers. (RA at 22a-36a) Indeed, a unanimous panel of the Eleventh Circuit, after requesting a response from plaintiffs, denied defendants' earlier writ petition seeking to decertify the class as being improperly based on a "churning" claim. (*Id.* at P)

Defendants' assertions, that it is "without contradiction" that plaintiffs precluded early resolution of the case by assuming unreasonable settlement positions, are also belied by the record.

---

2. Telemarketing boiler room fraud — where small investors are typically left with worthless claims against a defunct, bankrupt corporate shell — is one of Congress' concerns under the CEA. By the time the CFTC finally shut down MOI, the problem had become so acute that Congress convened hearings on the matter. *The Nature and Extent of Telemarketing Fraud and Federal and State Law Enforcement Efforts to Combat It: Hearings Before the Commerce, Consumer and Monetary Affairs Subcommittee of the Committee on Government Operations, House of Representatives*, 101st Congress, 2d Session, July 11 and 12, 1990.

(RA at H, I) Indeed, the district court specifically found that it was "Defendants [who] engaged in litigation tactics that substantially prolonged the case." (PA at S-6)

After seven years of contentious litigation, and on the eve of closing arguments after a five-month jury trial, defendants and plaintiffs agreed to settle. A $40 million fund was created to pay the claims of class members, with unclaimed amounts reverting to Grosfeld. Because attorneys' fees are the single largest claim against a class action settlement fund, and because the lodestar amounts for both sides were enormous given the length and intensity of the litigation, Grosfeld wanted class counsel to cap their fee request so as to give him more certainty regarding his likely payout. Conversely, class counsel wanted the settlement to end all disputes between the parties including disputes and related appeals over the fee and expense award. The parties expressly agreed, therefore, that class counsel would *limit* their fee request to a third of the total fund plus expenses, and that *in return* defendants would not object either "directly or indirectly" to a request in that amount. (PA at G-36) Both sides advocated approval of the settlement to the district court: defendants expressly told the district court that the settlement, after deduction of the fee and expense request, would provide an "exceptional" recovery to the class and that a fee request of one-third of the gross settlement fund would be "well within the range of reasonable." (PA at A-10 n.9; PA at S-3 n.3 & S-4; RA at 44a, 50a-51a)

After obtaining preliminary approval of the settlement and dismissal of the jury, defendants began reneging on their stipulations in order to create a larger reversion for Grosfeld. First, defendants objected to plaintiffs' request that the settlement administrator use an outside service to update stale addresses for class members who would be entitled to file claims. Second, defendants objected to, and then appealed from, the district court's award of fees and expenses to class counsel. Third, defendants sought to erect barriers to class members receiving their shares of the settlement, leading to two separate appeals currently pending in the Eleventh Circuit.

In short, defendants engineered a premeditated breach of their own settlement in order to derail an imminent jury verdict and obtain the benefits of their settlement including their negotiated cap on class counsel's fees, the reversion they now enjoy and dismissal of all claims. Their downside thus protected, defendants now seek this Court's assistance in rescinding their agreement on fees so as to create a larger reversion for themselves (90 cents of every dollar) and a multimillion loss for class counsel. Both the district court and the Eleventh Circuit rejected this unfair result, noting that the $13.3 million fee award represented a modest multiplier of only 1.05 on class counsel's actual lodestar investment in this case of over $12.6 million (PA at A-13) — this, after class counsel assumed the enormous risk of funding this matter through seven years of litigation, a five-month jury trial, and now three years of fighting defendants' frivolous appeals from their own settlement.

Against this background, defendants' assertion that it is plaintiffs' counsel who have "manipulated" the settlement process is transparently not credible, as both the district court and the Eleventh Circuit determined. In its final order rejecting defendants' efforts, the district court found that defendants' arguments were "frivolous," that defense counsel's testimony regarding comparative fees in other cases was based entirely on hearsay and was "not credible" and that defense counsel's statements concerning the unprecedented nature of the fee award directly "conflict[ed]" with his earlier statements in seeking the court's approval of the settlement. (PA at S-1, 3 n.3, 4) Similarly, a unanimous panel of the Eleventh Circuit found that "defense counsel's arguments about the 'exorbitant and unprecedented fee award,' . . . are in conflict with their earlier assertions to the district court" and that defense counsel's claimed interest in protecting the class "strains credulity" given that defendants are in reality seeking return to themselves of approximately 90% of any reduction in class counsel's fee. (PA at A-10 n.9, 13)

Further undermining the credibility of defendants' position is the fact that the American Association of Retired Persons ("AARP"), the largest consumer lobby group in the United States, filed a brief in the Eleventh Circuit supporting plaintiffs' fee award and rejecting each of defendants' arguments as undermining the economic incentives that would motivate class counsel to bring these types of cases against the operators of telemarketing boiler rooms. (RA at L) Indeed, if the Court adopted the rigid rule advocated by defendants — that district courts must always limit fees to a portion of the fund actually claimed by class members — telemarketing firms could cheat consumers without fear of civil liability so long as they stole relatively small amounts from each customer so as to minimize the likelihood of claims. That is precisely what Grosfeld did here; he then engaged in time consuming scorched earth litigation tactics. Only after class counsel had been forced to spend millions of dollars and only on the eve of an adverse verdict, did he agree to settle. No reasonable class counsel would undertake this type of risk and expense if fees were wholly based on the number of claimants who may come forward (years after the fraudulent transactions in question) to claim their shares of any settlement.

Despite resounding rejection of their position by the district court, by the largest consumer lobby group, by a unanimous panel of the Eleventh Circuit and by the failure of a single sitting Eleventh Circuit judge to vote for rehearing *en banc*, defendants continue their calculated charade in this Court where — yet again — they grossly distort the factual and procedural history of the case, make factual assertions nowhere supported in the record, make arguments directly contrary to arguments made below and cite to declarations stricken from the record by the Eleventh Circuit as having been improperly filed for the first time on appeal. It is defendants' tactics, not this fee award, which give lawyers and the legal profession a bad reputation.

Defendants urge this Court to accept unsupported and internally contradictory assertions as bases for eliminating a

district court's discretionary authority to consider all relevant factors in making fee determinations. There is no reason for this Court either to change the well-developed rules in this area or to review the instant fact-bound individualized fee determination. All precedents, including Supreme Court precedents, teach that district courts have broad discretion in setting an appropriate fee award and that courts are permitted to base the award on the total benefit achieved for the class, not just that portion of the benefit actually claimed by the class — a factor over which class counsel has no control.

There is no conflict in the circuits over this issue. Notwithstanding defendants' repeated reference to "coupon" settlements, this was *not* a "coupon" settlement; every class member who filed a timely claim has received approximately 20% of his or her out-of-pocket loss in cash and fully-secured, interest bearing promissory notes, with the average recovery being $1,200 and with some class members receiving in excess of $20,000. There is no important issue of federal law for this Court to decide in this case; the decision below was based on a long-standing and demonstrably sound "abuse of discretion" standard. Where, as here, the fee award barely covered class counsel's actual lodestar invested in the case, through seven years of litigation and five months of trial, there can be no abuse of discretion. Nor is any federal statute implicated. Defendants' citation to the PSLRA is disingenuous as this case involved no securities, but was brought under the Commodity Exchange Act ("CEA"), which has exclusive jurisdiction over the regulation of ETOs. Eliminating telemarketing fraud has been one of Congress' primary concerns under the CEA.

Moreover, as noted by the Eleventh Circuit, it would be singularly inappropriate for a court "to renegotiate on [defendants'] behalf the terms of an agreement concluded after arms-length negotiations." (PA at A-17) Defendants' continuing efforts to increase the monetary reversion to a boiler room operator by reneging on their agreements and disavowing representations they made to the district court to obtain approval of the settlement — all under the sanctimonious guise of championing the interests of the very class members they defrauded — should not be rewarded.

B. The Settlement

At or about the time the trial began in September 1996, defendants and plaintiffs discussed a settlement. It was during these lengthy and ongoing discussions that *defendants* — not plaintiffs — insisted on a reversionary settlement. (RA at 161a-162a)

The settlement stipulation provided that Grosfeld would create a settlement fund against which claims could be filed by class members and from which the fees and expenses of plaintiffs' class counsel and the settlement administrator would be paid. (PA at G-11, 12, 29-31) Of this amount 25% was to be paid in cash. (*Id.* at G-12) The remaining 75% was to be paid in the form of an interest-bearing master promissory note secured by an irrevocable letter of credit from a prominent national bank. *Id.* The settlement provided for a plan of allocation among class members who timely filed claims with a third-party settlement administrator in relation to each class member's recognized loss as a percentage of the settlement fund as a whole. (*Id.* at G-29) Any amounts not claimed by class members or used to pay the fees and expenses of counsel and the settlement administrator were to revert to Grosfeld. (*Id.* at G-27, 28)

Defendants expressly agreed not to object to a fee of up to one third of the *gross* settlement fund amount, plus expenses, *in return* for plaintiffs' agreement not to request a larger fee:

> "Plaintiffs' Class Counsel of Record *shall* apply for fees in an amount *not to exceed* 33-1/3% of the *Settlement Fund* plus their costs and expenses. . . . Defendants will *not directly or indirectly oppose* Plaintiffs' Class Counsel of Record's application for fees and expenses or compensation of the Representative Plaintiffs." (PA at G-36) (emphasis added)

The stipulation also stated that it was a "final and complete resolution of all disputes," (*Id.* at G-41), reached "voluntarily" (*Id.*) and that defendants "shall not attack this Stipulation in the settlement approval process." (*Id.* at G-21).

The parties also drafted and stipulated to a form of class notice that expressly told class members that counsel would be requesting a fee and expense award of one-third of the gross settlement fund amount, plus expenses, that class members would receive no more than 20% of their recognized losses if the fee request were approved, that any unclaimed amounts would be returned to defendants and that defendants would not be objecting to the requested fee. (PA at H-8, 16, 17, I-2)[3]

---

3. Defendants' accusations that the co-drafted class notice was misleading rests on the absurd notion that the notice should have anticipated the number of claims that would be filed and then compare the value of those claims to the fee request. Defendants argued in the Eleventh Circuit that plaintiffs' counsel had prior notice of a letter from the settlement administrator estimating a claims rate. Plaintiffs' counsel demonstrated below that this accusation was false and that the letter to which defense counsel referred was a letter that only defense counsel had received in *ex parte* communications with the settlement administrator. Indeed, plaintiffs demonstrated that it was defense counsel who withheld that letter from both plaintiffs' counsel and the district court until after obtaining preliminary approval of the settlement and dismissal of the jury. When confronted with these facts by the district court, defense counsel had to admit on the record that the letter had been sent solely to him prior to finalization of the settlement. (RA at 247a). Defendants similarly argued below that plaintiffs' counsel knew from the experience of claims filed in MOI's CFTC receivership proceedings that few class members would file claims against the settlement fund. Plaintiffs' counsel demonstrated below that this assertion is also false. The CFTC receiver had few if any funds to distribute and still received thousands of claims even though the receivers' notice cited statute of limitation defenses and strongly discouraged claims from all customers others than those trading ETOs during the last two years of MOI's 5-year existence. (RA at 154a). Here, by contrast, a $40 million fund was created and every class member filing a claim was assured of receiving approximately 20% of his or her out-of-pocket losses. With an average recovery of $1200, there was every reason to believe class members would have incentive to file claims. And, of course, defendants never told the district court they believed few class members would file claims; they instead urged approval of the Settlement as being fair and reasonable to the class.

The parties also drafted a proposed claim form that class members would use to submit claims against the settlement fund. In these negotiations, plaintiffs demanded and received a provision which prohibited the settlement administrator from rejecting any incomplete or inaccurate claim so long as the claim form could be corrected by the settlement administrator with information available from plaintiffs' counsel or MOI's records. (PA at G-33, 34)[4] Additionally, plaintiffs demanded and obtained a provision establishing a toll-free line to the settlement administrator so that class members could call the settlement administrator for instructions on how to complete the claim form. (RA at 20a)

Although the parties successfully negotiated a complete set of settlement documents, they had difficulty agreeing upon an amount for the settlement fund. On the eve of closing arguments defendants finally offered to fund the settlement with $40 million. Defendants' prior offers had been below that amount by in excess of $10 million. (RA at 152a)

C. Preliminary Approval of the Settlement and Dismissal of the Jury

When the district court learned of the settlement, it specifically asked whether the amount of attorneys' fees that would be requested had been "worked out" by the parties. (RA at 5a-6a) The district court was told that the parties had agreed that plaintiffs' counsel could — without objection — request a fee amount of up to 33-1/3% of the $40 million settlement fund plus costs. (*Id.*)

For several days, the district court conducted a series of hearings and conferences to review the details of the settlement. While some of these conferences took place in chambers off

---

4. In fact, one of the related appeals that defendants are currently pressing in the Eleventh Circuit challenges the district court's order instructing the settlement administrator to allow those claims of class members who filed incomplete claim forms capable of correction. This is all part of defendants' overarching strategy to renege on every part of their settlement agreement requiring payments to class members and class counsel.

the record or by telephone, the court later recited on the record various statements which defendants now deny making, although defendants did not dispute them at the time they were put on the record. At no time during these discussions did defendants indicate they believed only a small portion of the class would file claims or that any part of the settlement agreement, notice or claim form was misleading or unfair. Defendants did not then tell the court they were forced into a "clear-sailing" agreement. To the contrary, defendants' settlement counsel vociferously argued that even after deduction of the proposed fee the settlement would produce "an exceptional benefit to the class members." (PA at A-10 n.9; RA at 44a) Indeed, the parties *jointly* presented the district court with a study done by the National Economic Research Association ("NERA") as supporting the fairness of the settlement and reasonableness of the fee request. (PA at A-8 n.7; S-3-4 & n.3) Defendants' counsel, when asked about the fee, assured the district court that "a fee of one-third the gross amount of the settlement fund would be well within the range of reasonable." (PA at A-8 n.7, 10 n.9; RA at 50a-51a)

After several days of exhaustive review, discussion and modification of the settlement, the district court held a hearing in open court, at which time plaintiffs' settlement counsel, set forth the basic terms of the settlement and summarized some of the in-chambers discussions. When the district court asked defendants if they had anything to add, defense counsel affirmed that Plaintiffs' counsel had correctly outlined the settlement and that he had *nothing* further to add. (RA at 22a)

The district court then entered the stipulated preliminary approval order and told the parties it was dismissing the jury. (*Id.* at 36a-38a) That order *again* expressly states that defendants are *not* objecting to the fee and expense request. (PA at B-8)

D. Defendants' Breaches and the District Court's Fairness Hearings

Having locked class counsel into their negotiated fee cap through entry of the preliminary approval order and dismissal of the jury, defendants then began to undermine and renege on their agreements. First, they attempted to minimize the number of claims filed by class members by objecting to the settlement administrator's use of an address locator service — requiring the district court's intervention. (RA at 246a-247a) Then, defendants urged the district court to wait to see how many claims were actually filed against the settlement fund and only award plaintiffs' class counsel a percentage of the amount actually claimed, as opposed to a third of the fund created as they had stipulated. (*Id.*)

Out of a class of approximately 20,000 individuals, the court received only one objection to the settlement. (PA at A-10 n.9; RA at 249a) That objector told the district court she did *not* object to class counsel's fee and expense request. (*Id.*) Furthermore, no class member intervened or appealed the district court's final approval order.

At the March 31, 1997 fairness hearing, the district court reviewed the history of the case, including the in-chambers, off-the-record discussions, noting that even defendants had agreed that the settlement, after deduction of fees and costs, would "produce an exceptional benefit to the class members." (RA at 44a) The district court went on to note that defendants had — prior to the jury's dismissal — expressly supported the reasonableness of the fee:

> "Now, I do want to note that the settlement's stipulation that the — excuse me, that the fee request of one-third of the settlement fund is the maximum amount of fees that the parties agreed — the parties, that's both sides — agreed could be sought pursuant to the settlement stipulation that the Court approved at the end of January, *after being assured by both sides that a fee of one-third of the gross amount of*

> *the settlement fund would be well within the range of reasonable.*" (*Id.* at 50a-51a (emphasis added))

Defendants' counsel took no issue whatsoever with the district court's summary of what they had previously said during the in-chambers, off-the-record preliminary approval discussions. In fact, moments later when asked whether defendants wanted to comment on any of the matters being covered, defendants' counsel said they had only one comment concerning the request of the lone objector for an extension of time in which class members could make claims. (*Id.* at 60a)

Defendants' assertions that the district court never made such a statement *until* two months later in its May 8, 1997 order, and that the court fabricated its statements in that order are deplorable falsehoods rejected by the Eleventh Circuit.[5]

---

5. Defendants tell this Court that the district court was "mistaken" in its attribution of these statements to defendants' counsel. Petition at 29. By contrast, defendants told the Eleventh Circuit that the district court had "purposefully" erred in making these statements. (PA at U-3) In any event, the district court did not merely put these statements in its May 8, 1997 order; as noted above, it put them on the record — without objection from defendants — at the March 31, 1997 fairness hearing. In the fall of 1998 when the case was on appeal, defendants' counsel submitted the three declarations which they now cite to in which they claim they never made these statements. (PA at T-11-20) The Eleventh Circuit struck those declarations from the record as being an improper attempt to introduce evidence for the first time on appeal. (PA at V) Defendants nevertheless refer this Court to those declarations without noting that those declarations were filed only as part of their appeal. Petition at 29 n.32. When confronted with their failure to object to the district court's statements at the March 31, 1997 fairness hearing, defendants told the Eleventh Circuit that they had, in fact, objected to those statements in connection with their April 21, 1997 motion to alter or amend the judgment. (PA at X-26) Defendants, however, misleadingly cited the Eleventh Circuit not to the declaration filed on April 24 (which, in fact, said nothing about the district court's March 31 statements) (PA at O), but to declarations which they filed with the district court only *after* the district court entered and faxed its May 8, 1997 order

(Cont'd)

The district court noted that defendants sought to back out of their obligations under the agreement, while obtaining all the benefits and imposing a multimillion dollar loss on class counsel. (RA at 91a-92a) Contrary to defendants' assertion that the district court was misled, the court expressly understood that a significant portion of the settlement fund might not be claimed. (*Id.* at 99a) (The Eleventh Circuit flatly rejected this linchpin of defendants' entire argument. (PA at A-7-8 & n.7)) The district court also noted that even fewer class members would have been able to claim but for plaintiffs' counsel's efforts to obtain an order requiring the settlement administrator to use a locator service to resend claims packets to persons whose addresses had been stale. (RA at 96a-101a)

The district court addressed each of defendants' objections and methodically went through the relevant fee determination factors, noting that most resulted in an upward adjustment of the normal fee benchmark. (PA at A-6-7; RA at 96a-101a)

The district court had before it not only the NERA study of nationwide fee awards, but the declaration of an expert in complex commodities litigation. (RA at G) The declaration noted the difficult groundbreaking nature of this class action suit against the upstream operators of a defunct commodity telemarketing firm and demonstrated how favorably the results in this action compared to other private commodities litigations and CFTC restitution programs. (*Id.*) The district court awarded plaintiffs' counsel a fee award of one-third of the $40 million settlement fund or $13.3 million, with $5 million of this amount to be payable in cash and the remainder to be payable as a deferred obligation.

(Cont'd)

and officially closed the case file. (PA at P, Q, R; RA at J, N) In short, defendants never disputed the district court's March 31, 1997 statements until after the case was closed in May, and the Eleventh Circuit agreed that defendants' representations on appeal are "in conflict with their earlier assertions to the district court." (PA at A-10 n.9).

On April 25, 1997, the district court held a hearing to resolve plaintiffs' counsel's expense requests. Three days before that hearing, and long after the March 17, 1997 stipulated deadline for filing objections had expired, defendants filed a motion requesting the district court to alter or amend its prior fee award. (PA at L) Notwithstanding that defendants and plaintiffs had jointly provided the district court with the NERA study when asking the court to approve the settlement, defendants now attacked the district court's reliance on that study, claiming to have done a telephone survey of *unidentified* counsel supposedly involved in the cases included in that study, and concluding from their own "hearsay" survey that the fee and expense award was "excessive." (PA at M, O-7) At the end of this hearing, the district court again expressed displeasure that defendants were now taking positions contrary to those taken in chambers: "the NERA study was offered by *both sides* . . . as authoritative; . . . it was represented to me that the fee award sought was well within the range of common practice in these types of cases. . . ." (emphasis added) (RA at 104a) Again, defendants did not dispute they had made these statements in seeking the court's preliminary approval of the settlement.

In its May 8, 1997 final order denying defendants' motion to alter or amend the fee award, the court found that the motion was "frivolous." (PA at S-1) The court also noted that defendants' evidence in support of the motion (namely their continuing unsupported claim that the award is 400% greater, relative to class distributions, than any prior case) was based entirely on hearsay, that it was inconsistent with defendants' counsel's prior representations, and that it was defendants' counsel who previously had advocated the NERA study as supporting the proposed fee: "in those discussions, counsel for both sides assured the Court that their experience and the findings contained in the NERA Study would support an attorneys' fee award in [the amount of $13,333,333]." (*Id.* at S-3 & n.3, 4) The district court even noted that it had personally telephoned the author of the NERA study who contradicted the representations that defense counsel

was making about the information contained in the report. (*Id.* at S-4, 5) The district court therefore rejected defense counsel's testimony as being "not credible." (*Id.* at S-4)[6]

The district court also noted that a fee award based solely on the number of claims actually received would reward defendants for having unnecessarily prolonged the litigation knowing that the claim rate decreases with the passage of time. (*Id.* at S-6) The district court also noted that it would be "highly inequitable" under the circumstances of this lengthy and expensive case to adopt defendants' position. The court noted that its analysis at the March 31, 1997 fairness hearing required an upward adjustment to the fee benchmark. (*Id.* at S-6-7)

E. Defendants' Appeal

Defendants then appealed from their settlement agreement, claiming that they had been "coerced" into their agreements by overreaching class counsel and a "contumacious" district court. Recognizing that the record undermined their arguments, defendants attempted to create a new record on appeal first by filing declarations in the district court after the case was closed (PA at P, Q, R) and then by submitting declarations in the Eleventh Circuit purporting to take back the statements which they had made to the district court in seeking preliminary settlement approval and which the district court had then put on the record without objection. (PA at T-11-20) The Eleventh Circuit ordered the declarations filed for the first time on appeal stricken from the record and ordered defendants to submit a new brief deleting those references. (*Id.* at V) Defendants again made reference to the declarations in their revised brief and

---

6. Defendants now — for the first time — complain that the district court made *ex parte* contact with the author of the NERA study. Defendants' complaint is disingenuous given that defendants' counsel, who submitted the declaration regarding the settlements in the NERA study, failed to show up at the hearing for questioning or cross-examination. This incident only highlights that the district court vigorously exercised its duty to conduct an independent investigation of the reasonableness of the fee request.

again the Eleventh Circuit ordered their brief stricken. (RA at K) A unanimous panel of the Eleventh Circuit affirmed the district court's fee award. (PA at A) When defendants requested a rehearing, with a suggestion of rehearing *en banc*, not one judge of the Eleventh Circuit voted to hear the case. (*Id.* at F) The Eleventh Circuit also denied defendants' request for a stay of mandate pending their petition to this Court for a writ of certiorari. (RA at A)

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Propriety Of A Particular Fee Award Is A Fact-Bound Decision, Determined On A Case-By-Case Basis And Reviewed Only For An Abuse Of Discretion.

The Court would be ill advised to adopt the rigid, formulaic standard which defendants propose should govern fee awards. It is Hornbook law that district courts have "broad discretion" in determining an appropriate fee award on a case-by-case basis. "[I]ndividualization in the exercise of a discretionary power [for fee awards] will alone retain equity as a living system and save it from sterility." *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 167 (1939); *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991).

Defendants' latest theme — raised for the first time in their petition to this Court — is that "reversionary" settlements are part of a "scandalous" "scheme plaguing the federal courts" for the purpose of "enriching" class counsel. Petition at 3, 26, 28. By contrast, defendants argued to the Eleventh Circuit that reversionary settlements are "very rare." (PA at W-30) Both here and in the Eleventh Circuit, defendants have argued that class counsel manipulated the settlement in order to generate an "exorbitant" fee at the class' expense. But in the district court, of course, defendants urged approval of the settlement as being fair and reasonable to the class.

Defendants' ever-changing situational arguments have one thing in common: they are all totally lacking in any evidence suggesting collusion, manipulation or other unfair practices designed to harm the interests of class members. Both the district

court and the Eleventh Circuit concluded that the settlement was the result of vigorous arms-length negotiations. (PA at A-5 n. 4, 17) Similarly, the AARP, as spokesperson for millions of older American consumers, is not in the habit of filing amicus briefs supporting fee awards to class counsel who have engaged in "schemes" to enrich themselves at the expense of their consumer clients.

There is absolutely no basis to conclude that reversionary settlements are part of a "scheme" or are generally unfair. As noted by Professor Newberg, reversionary settlements are one of several commonly accepted methods for dealing with unclaimed funds. 2 H. Newberg and A. Conte, *Newberg on Class Actions* (3d ed. 1992) (hereinafter "*Newberg*") § 10.15 at 10-38, § 10.17 at 10-40 & n.124 (collecting cases). Indeed, many of the leading cases discussing class action fee awards involved reversionary settlements. *Camden*, 946 F.2d at 771 n.2; *Skelton v. General Motors Corp.*, 860 F.2d 250, 254 n.1 (7th Cir. 1988); *In re Crazy Eddie Secs. Litig.*, 824 F. Supp. 320, 323, 326 (E.D.N.Y. 1993) (reversionary settlement where the court awarded $14.2 million in fees representing 33.8% of the gross amount of the $42 million settlement fund, plus $2 million in expenses, in a case where there was no trial). There is authority that even where the defendant's liability to the class has been proven, any unclaimed portion of the judgment amount should revert to the defendant and should *not* be distributed *pro rata* to class members who did file claims. *See, e.g., Van Gemert v. Boeing Co.*, 739 F.2d 730, 736-37 (2d Cir. 1984); *Van Gemert v. Boeing Co.*, 553 F.2d 812, 815-816 (2d Cir. 1977); *see also* 2 *Newberg* § 10.20 at 10-52. These cases reason that the equitable interest in the unclaimed funds belongs to the class members who have *not* claimed, and that class members who have claimed are no more entitled to those funds than is the defendant.

Indeed, defendants' underlying assumption — that all funds are automatically distributed to class members in the absence of a reversionary settlement — is plain wrong. "Most class actions result in some unclaimed funds," the disposition of which

is left in the district court's discretion. *See, e.g., Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990) (discussing the various alternatives used by courts for distributing such funds). Some courts permit the shares of non-claiming class members to be distributed *pro rata* to class members who have claimed their shares. *Id.* at 1307 n.4. Other courts, however, find there is no just reason to give claiming class members a windfall by allowing them to capture the shares of nonclaiming members as well. *See Van Gemert*, 553 F.2d at 815 (rejecting this approach as an improper "fluid class" recovery). Courts have reached various solutions — including *cy pres* distribution to a next best class, reversion of unclaimed balances to the defendant and escheatment of unclaimed balances to the government. *Six Mexican Workers*, 904 F.2d at 1307-08. *See also* 2 *Newberg* §§ 10.15, 10.16, 10.17, 10.19, 10.20.

In other words, district courts are often called upon to exercise their equitable discretion in allocating unclaimed balances. Class counsel are never penalized by having to return a portion of their fee award when unclaimed balances remain at the end of the claims process and the district court determines that those funds should revert to the defendant, escheat to the government or be distributed under the *cy pres* doctrine. There is no reason why a different result should obtain here, where the district court at the time of final settlement approval made a determination that it would be fair, in the context of this settlement, for unclaimed balances to revert to the defendant.

Moreover, defendants' credibility is undermined by the very affidavit on which they rely to argue that the fee award at bar was 400% greater than the highest fee award ever made in the Eleventh Circuit. Defendants' counsel submitted an affidavit in the district court representing that defense counsel had made an *ex parte* telephone survey of the various lawyers involved in the twenty-nine settlements from the Eleventh Circuit contained in the NERA study. (PA at M) Counsel claimed that although thirteen (*i.e.*, 45%) of those twenty-nine settlements were

"reversionary," no unclaimed funds were left in *any* of those reversionary settlements. Defendants' counsel concluded, therefore, that the NERA study was, in fact, based on actual distributions, rather than the size of the fund created. But if — as defendants claim in their petition — class counsel knew, or should have known, that only a small percentage of the class would file claims, how is it that there were no unclaimed funds in any of the thirteen reversionary settlements contained in the NERA study? Either defendants are wrong about the claims history of the settlements in the NERA study or they are wrong in their assertion that only a small fraction of class members typically file claims. The district court rejected defense counsel's affidavit as being "not credible." (PA at S-4) We know, because the district court personally called the author of the NERA study, that the fee awards in those twenty-nine cases were based on the entire settlement fund created, without regard to whether the amounts were actually later distributed. Indeed, most fee awards occur at the time of final settlement approval, whereas the claims process often goes on for months or even years later. Thus, it would be unusual for a district court to know the final results of the claims process at the time fees are awarded.

Defendants' efforts to "chart" the disparate fee awards they claim result from reversionary as compared to *pro rata* settlements further demonstrates the absurdity of the rigid, formulaic rule they would have this Court adopt. It is not true that class counsel who creates a $40 million reversionary settlement fund will always receive the same fee as class counsel who creates a $40 million *pro rata* settlement fund. Where, as here, class counsel litigated a difficult and contentious case through seven years of litigation and a five-month jury trial, incurring an actual lodestar of over $12.6 million, a $13.3 million fee award (representing one-third of the $40 million settlement fund, which in turn represents one-third of the actual out-of-pocket losses of $120 million) was entirely reasonable. Every class member who submits a claim is entitled under this settlement, after deduction of fees and expenses, to receive 20%

of his or her out-of-pocket losses.[7] On the other hand, class counsel who obtains a $40 million *pro rata* settlement (based on out-of-pocket losses of $700 million) after only a few months discovery and little invested in the case, would be entitled to a much smaller fee. In other words, whether the settlement is reversionary or *pro rata* is only one of many factors that the district court, and a reviewing court, must take into consideration in setting an appropriate fee award under all the circumstances of the particular case.

In this case, the average pay-out to class members filing a claim ($1,200) seemed sufficiently large to provide filing incentive. Indeed, it was a far larger average recovery than individuals typically receive in a class action. (RA at 136a, 154a) As Professor Newberg has noted, this factor typically results in a higher than average claim rate. *See 2 Newberg* § 11.18 at 11-24. Defendants — while downplaying the benefit created by class counsel — have admitted that class members typically receive only "2% to 10%" of their out-of-pocket losses from class settlements, even where the settlement agreement provides for a *pro rata* distribution. (PA at W-37). Here, by contrast, every class member who filed a claim has received approximately 20% of his or her out-of-pocket loss from this reversionary settlement. Individual class members do not care about the *total* amount claimed by the class as a whole; they care about the amount of their *individual* share. A recovery of 20% of out-of-pocket losses *significantly exceeds* the national norm. Notwithstanding defendants' repeated references and citations to "coupon" settlements, this settlement was *not* a "coupon" settlement; class members received cash and fully-secured, interest-bearing promissory notes, with some class members receiving in excess of $20,000 and numerous others receiving several thousands of dollars. Furthermore, provisions providing a formula for the distribution of the net settlement fund, after the payment of counsel fees and expenses, according to class members' recognized losses, as well as the filing of

7. Defendants admit this fact. (PA at Q-3, ¶8)

proofs of claim, are standard and accepted procedures in a class action settlement. 3 *Newberg* § 12.35 at 12-90.

II. There Is No Conflict Among The Circuit Courts Regarding This Court's *Boeing* Decision.

Struggling to create some issue worthy of this Court's review, defendants wrongly tell the Court that there is a split among the circuits on how to apply this Court's decision in *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980). Each circuit gives district courts broad discretion in determining fee awards and reviews fee determinations under an "abuse of discretion" standard. Whether a settlement is "reversionary" or "*pro rata*" is only one of many factors that district courts are permitted to consider in setting an appropriate fee.

In *Boeing*, this Court held that class counsel's fee award may be measured by the size of the common fund established for the benefit of the class and not merely by the value of the claims eventually asserted against the fund:

> "[Class members'] right to share the harvest of the lawsuit upon proof of their identity, *whether or not they exercise it*, is a benefit in the fund created by the efforts of the class representatives and their counsel. Unless absentees contribute to the payment of attorneys' fees incurred on their behalves, they will pay nothing for the creation of the fund and their representatives may bear additional costs." *Id.* at 480 (emphasis added).

Moreover, the Court noted that the result is the same notwithstanding that defendant may have a reversionary and "latent" interest in the funds, if unclaimed. *Id.* at 481-482. Once the fund was established for the benefit of class members, all class members held equitable interests in their respective shares of the fund. *Id.* In assessing fees, it was therefore proper for the district court to look at the entirety of the fund created for the benefit the class. *See also* 3 *Newberg* § 14.03 at 14-14.

Defendants' argument — that *Boeing* decided only whether it would be impermissible "fee-shifting" to base class counsel's fee on the entirety of the fund, and not whether fees must be based on the entirety of the settlement fund — proves too much. Of course, *Boeing* does not say fees "must" be based on the entirety of the fund, but the Court clearly held that it was "permissible" to base fees on the entirety of the fund. It is not impermissible "fee-shifting" to base a fee award on the entire fund because class members, whether they claim their shares or not, have "benefited" and hold an equitable interest in the fund that has been created through the efforts of class counsel.

Defendants' reliance on footnote 5 of this Court's *Boeing* decision, to distinguish between the judgment fund in *Boeing* and the settlement fund at bar, is misplaced. The defendants' liability in *Boeing* (where they had to pay the judgment fund into court subject to receiving a portion of it back in the event it was not all claimed) is logically no different than Grosfeld's liability here (to pay the full settlement amount to the settlement administrator with no right to return of any funds unless and until class members fail to claim their shares). Indeed, almost ten years ago, the Eleventh Circuit rejected this notion in the very decision in which it adopted the "percentage of the fund" method for calculating fees in a common fund case. *Camden*, 946 F.2d at 771 n.2. There, the court flatly rejected as having "no merit" the argument that basing counsel fees on the entirety of a reversionary settlement fund would constitute impermissible "fee shifting": "The settlement clearly created a common fund for the satisfaction of the County's liabilities." *Id.*; *accord Skelton,* 860 F.2d at 254 n.1 (rejecting the argument that defendant's right of reversion in a class settlement changed the "common fund" analysis). Whether or not defendants have a reversion, each class member has "an undisputed and

mathematically ascertainable claim" against the fund created on his behalf. *Boeing*, 444 U.S. at 479.[8]

Moreover, defendants' argument — concerning overreaching counsel and disproportionate fee awards — is the same misguided "public relations" argument which was initially adopted by the lower court in *Boeing* and then rejected by an *en banc* hearing of the court of appeal and later by this Court. *See Van Gemert v. Boeing Co.*, 573 F.2d 733, 735-36 (2d Cir. 1978) (criticizing large fee awards and holding that only the claimed portion of the fund could support a fee award), *rev'd en banc*, *Van Gemert v. Boeing Co.*, 590 F.2d 433 (2d Cir. 1978), *aff'd*, *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980). The Second Circuit *en banc* decision which this Court affirmed in *Boeing* provides an even more detailed discussion of why defendants' position is untenable. The *en banc* panel noted that a contrary rule would unduly penalize either claiming class members or class counsel. *Van Gemert*, 590 F.2d at 440-41. To award class counsel a reasonable fee bearing some proportion to their effort, courts would be forced to reduce disproportionately the share of claiming class members in order to cover a fee that could be taxed only against those claimants' shares. *Id.* On the other hand, protecting claiming class members by limiting class counsel to a fixed percentage of the fund actually claimed would make the resulting fee entirely dependent on the number of plaintiffs who

---

8. Indeed, the lack of impermissible "fee-shifting" is even more obvious in the context of a settlement where the defendant *agrees* that the fee may — without objection — be based on the entirety of the settlement fund. There has never been any legal principle precluding the assessment of fees against a defendant's latent interest where, as here, the defendant has agreed to that procedure. *See, e.g., Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) Defendants' other assertion — that the *Boeing* Court made clear that defendants' liability was "not subject to a reversion" (Petition at 21) — is obviously false. The Court expressly recognized this possibility, 444 U.S. at 477, 482, but expressed no opinion on the ultimate outcome. *Id.* at 482 n.8. In fact, all unclaimed funds in *Boeing* did revert to the defendant. *Van Gemert*, 739 F.2d at 733.

came forward — notwithstanding the difficulty of the case, the quality of representation or the hours spent by class counsel. *Id.* at 441. The panel also noted that because the number of plaintiffs who will come forward to claim their shares is unpredictable, class counsel would be discouraged from pursuing class suits, regardless of the merits of the case. *Id.* at 435, 441.

The decision of the Eleventh Circuit below is entirely consistent with *Boeing*. It held that class counsel's fee award may be, but need not be, based on the entirety of the settlement fund created for the benefit of the class. The court noted that district courts must look at the entire panoply of factors relevant to determining a proper fee under all the circumstances of the particular case. The court also noted that class counsel's fee in this case was only a "modest lodestar multiplier of 1.05%" over class counsel's actual lodestar of $12,663,897.

Contrary to defendants' assertion, the Ninth Circuit did not hold in *Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026 (9th Cir. 1997), that a district court must — as a matter of law — base a fee award on the total amount of a reversionary settlement fund. The Ninth Circuit held that under *Boeing* a district court "may" base the fee on the entire fund, *id.* at 1027, and that the district court had "abused its discretion" in that case, *id*, by limiting class counsel to a fee based only on the actual amounts claimed. The Ninth Circuit held that the district court should have based the fee either on the amount of the settlement fund created *or on the actual lodestar. Accord, Six Mexican Workers*, 904 F.2d at 1311 (noting that fees may be "assessed against every class members' share, not just the claiming members" and that the lodestar method should otherwise be used if "the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors").

Defendants' assertion that the Fifth Circuit in *Strong v. Bell South Telecomm., Inc.*, 137 F.3d 844 (5th Cir. 1998), held that only actual payouts should be considered is again wrong. Since

the Fifth Circuit bases fee awards on a lodestar, rather than a percentage of the fund method, the court found that this Court's decision in *Boeing* was inapplicable to the case. Moreover, unlike here, the court found that no common fund had been established on which to base a fee award. Instead, class members were to continue in a plan or receive credits for future telephone usage. Moreover, the court awarded plaintiff's counsel an amount "which exceeded the lodestar figure plus costs." *Id.* at 851.

There also is no confusion in the lower courts as defendants suggest. As the Eleventh Circuit noted in its opinion below, "no case has held that a district court must consider only the actual payout in determining attorneys' fees." (PA at A-9) The lower court cases cited by defendants were distinguished below as cases involving "coupon" settlements incapable of precise valuation, settlements involving no "common fund" because they were subject to further alternative dispute resolution procedures, or suits that were settled with little effort by plaintiffs' counsel and little benefit to class members. Moreover, each of those cases awarded class counsel an amount equaling or exceeding class counsel's actual lodestar. (RA at 275a-278a) The Eleventh Circuit agreed that the cases cited by defendants all "emphasize that attorneys' fee awards are in the discretion of the district court and . . . illustrate that whether a district court judge considers the total fund or the actual payment will vary according to the circumstances of each case." (PA at A-9 n.8)

III. This Case Presents No Important Issue Of Federal Law.

Defendants improperly invite this Court to create a "federal law" issue by rewriting the Private Securities Litigation Reform Act ("PSLRA") to cover futures contracts and commodities boiler rooms. This case, however, involves no securities, falls outside the jurisdiction of the PSLRA and under the exclusive jurisdiction of the CEA. 7 U.S.C. § 2(a)(ii) (CFTC has exclusive jurisdiction over commodity futures and options). The federal courts have repeatedly recognized that Congress did not intend

to apply the federal securities laws to commodity trading accounts. *See, e.g., Cohen v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 722 F. Supp. 24, 26-27 (S.D.N.Y. 1989) (collecting cases). Defendants neither dispute the CEA's exclusive jurisdiction, nor that this action was commenced years before the 1995 PSLRA.

The PSLRA is only relevant to demonstrate that Congress knows how to take legislative action in the area of fee awards if it deems such action appropriate, and that it chose not take such action with respect to the CEA.[9] To the contrary, Congress has created broad remedies under the CEA, not available under the securities laws, including express private rights of action for civil aider and abettor liability. 7 U.S.C. § 25(a). It has also made telemarketing fraud in the solicitation of commodity option customers one of the CFTC's highest priorities. 7 U.S.C. § 9(b).

Unable to address these fundamental principles establishing that the PSLRA is irrelevant to this case, defendants ask that the Court adopt their "policy" view that Congress intended the PSLRA to address "scandalous" "manipulation of reversionary settlements." (Petition at 24, 26) Of course there is no evidence of any such policy or of defendants' heretical subtext that Congress' intent was to apply this PSLRA provision to boiler room commodities class actions. To the contrary, this action raises none of the concerns that motivated Congress to enact the PSLRA — precluding securities strike suits that ultimately harm the interests of the very class members they purport to champion (*i.e.*, shareholders), by holding corporate treasuries ransom to class counsel based on innocent declines in stock prices. In a securities suit, class counsel may actually harm their own clients (*i.e.*, the shareholders of the company they are suing)

---

9. *Cf. Meghig v. KFC Western, Inc.*, 516 U.S. 479, 484-85 (1996) (the inclusion by Congress of a remedy provision in one statute demonstrates that Congress knows how to draft such a provision and that it could have provided for such a remedy in an earlier enacted statute, if it wished to do so).

if they receive a fee from the corporate treasury that is greater than the amount of money they put into shareholders' pockets.

That is not true with respect to consumer claims, including CEA claims, brought against the operators of telemarketing boiler rooms. Class counsel in this case has not taken its fee from the corporate treasury in which any shareholder clients hold ownership interests. To the contrary, class counsel has generated a fund in which class members had no prior interest and which would not have existed but for counsel's assumption of the risk and effort needed to create the fund.

IV. Given The Facts At Bar, This Is A Singularly Inappropriate Case For Review.

Moreover, the factual background of this case makes it a singularly inappropriate vehicle for deciding the issues. Defendants' ever-changing arguments, their attacks on the integrity of the district court, their distortion of the factual record, their disavowal of representations made to the district court to obtain approval of the settlement and their reliance in this Court on declarations which have been stricken from the record, should not be rewarded.

No legal principle permits a party to modify or reform his or her stipulation of settlement so as to leave the settlement in place, but to rescind the fee agreement provision. *See, e.g., Evans v. Jeff D.*, 475 U.S. 717, 726-28, 741 (1986) (reversing a court of appeals decision which had invalidated a negotiated fee provision while allowing the remainder of the class settlement to stand); *Williams*, 129 F.3d at 1027 (holding that fee award should be based on the total amount of the settlement fund and noting that defendants had no cause to object since they had agreed to that process in the settlement agreement); *Skelton v. General Motors Corp.*, 860 F.2d 250, 260 (7th Cir. 1988) (noting that a party cannot keep the benefits of his settlement, while appealing from an agreed-upon fee provision); *In re Copley Pharmaceutical, Inc. "Albuterol" Prod. Liab. Litig.*, 1 F. Supp.2d 1407, 1416 (D. Wyo. 1998) (basing class counsel's fee on the gross amount of the settlement fund, noting that

"defendant cannot complain now that class counsel seek to do what the settlement agreement explicitly contemplates").

Defendants' argument regarding the so-called "clear sailing" agreement is of no consequence to this petition. The Eleventh Circuit permitted defendants' appeal from their own settlement agreement and affirmed the district court's ruling on the merits. Moreover, nothing in the cases cited by defendants permits a party to appeal from his own agreement under the guise of protecting the class. Those cases merely hold that a private fee agreement between the parties to a class action settlement does not obviate a district court's independent responsibility to review the reasonableness of a fee request. The Eleventh Circuit found that the district court properly performed this duty.

Additionally, in *Malchman v. Davis*, 761 F.2d 893 (2d Cir. 1985), the lead opinion of Judge Oakes was *actually critical* of the analysis of "clear sailing" agreements which defendants cite to in Judge Newman's concurring opinion, noting it was based on an unrealistic view of the settlement process:

> "[W]here, as here, the amount of the fees is important to the party paying them, as well as to the attorney recipient, it seems to the author of this opinion that an agreement "not to oppose" an application for fees up to a point *is essential* to completion of the settlement, because the defendants want to know their total maximum exposure and the plaintiffs do not want to be sandbagged. It is difficult to see how this could be left entirely to the court for determination after the settlement." *Id.* at 905 n.5 (emphasis added).

Defendants also cite *Prandini v. National Tea Co.*, 557 F.2d 1015 (3d Cir. 1977) for the proposition that it is improper simultaneously to negotiate a class action settlement and an agreement on class counsel's fee award. This Court rejected this notion in *Evans v. Jeff D.*, 475 U.S. at 733-38, noting as did Judge Oakes in *Malchman*, that it is essential to the completion

of a settlement for a defendant to know the maximum exposure under the settlement. This, of course, is why defendants negotiated for the cap on class counsel's fees here. The Eleventh Circuit specifically noted — contrary to defendants' assertion that "clear sailing" agreements are pushed by class counsel solely to silence defendants — that the purpose of these agreements is "so that defendants have a more definite idea of their total exposure." (PA at A-3 n.3) Thus, defendants' assertion that they were "concerned" about discussing fee issues in the context of the settlement (Petition at 11) is nonsense.

In sum, the settlement fund achieved in this hard-fought case bestowed a benefit to the class that otherwise would have been unavailable. That not all class members claimed against the fund was — as the district court specifically found — partially of defendants' creation (due to delaying tactics and efforts to prevent the remailing of class notices) and partly due to the district court's crowded docket (over which plaintiffs had no control). (PA at S-6) The district court specifically found that it would be "highly inequitable" under the circumstances of this case to saddle class counsel with a multimillion loss for circumstances over which they had little or no control. (*Id.*)

CONCLUSION

The Court should deny the writ.

Respectfully submitted,

C. BRANDON WISOFF
Counsel of Record
NEIL A. GOTEINER
FARELLA BRAUN & MARTEL LLP
235 Montgomery Street
San Francisco, CA 94104
(415) 954-4400

ERIC G. LIPOFF
RARING & LIPOFF
3070 Bristol, Suite 650
Costa Mesa, CA 92626-3072
(714) 429-2970

Attorneys for Respondents

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING MOTION OF APPELLANTS FOR STAY OF ISSUANCE OF MANDATE PENDING PETITION FOR WRIT OF CERTIORARI DATED AND FILED JANUARY 24, 2000

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 97-5074

WILLIAM WATERS, LINDA BARTHOLOMEW, individually, and on behalf of all others similarly situated,

Plaintiffs-Appellees,

versus

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INCORPORATED, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

ORDER:

(X) The motion of Appellants for (x) stay . . . of the issuance of the mandate pending petition for writ of certiorari is DENIED.

* * *

/s/ STANLEY F. BIRCH, JR.
UNITED STATES CIRCUIT JUDGE

APPENDIX B — EXCERPTS FROM VOLUME 52 OF TRANSCRIPT OF TRIAL PROCEEDINGS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED JANUARY 27, 1997

[commencing at page 8256]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 90-6863-Civ-UNGARO-BENAGES

WILLIAM WATERS and LINDA BARTHOLOMEW,

Plaintiffs,

– v –

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, MULTIVEST REAL ESTATE, INC., S.S. MELBOURNE, INC., and THE CYPRESS GROUP, INC.,

Defendants.

Miami, Florida
January 27, 1997
9:07 a.m.

VOLUME 52

TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE URSULA
UNGARO-BENAGES
U.S. DISTRICT JUDGE, and a jury

* * *

Appendix B

[8257] * * *

(Call to order of the Court)

THE COURT: Okay. Good morning.

Do you need appearances, Bill?

THE REPORTER: No.

THE COURT: Okay. Well, Mr. Goteiner called the chambers this morning and said you all had reached a settlement. Of course, this is a 23(b)(3) class action and reaching a settlement isn't all that easy. So, I mean, I'm willing to listen, but my inclination is to say sorry, guys, too late.

I'm willing to work with you possibly and possibly take a sealed verdict and let you try on getting the papers done after closing arguments while the jury is deliberating. But then, of course, that would have to be disclosed in the notice to the class as part of the disclosures so that they could make an informed decision as to whether or not they [8258] wanted to object.

MR. GOTEINER: Your Honor, if I may.

THE COURT: Yes.

MR. GOTEINER: While the papers have been drafted, except the motion for preliminary approval, what's been happening is since the trial began the parties have engaged

in the long settlement process, and it just so happened that last night late a resolution was reached.

A couple of things. One is we'd like your Honor to consider the settlement, and we would also like your Honor to agree not to sua sponte recuse yourself by hearing the settlement.

THE COURT: Well, if that's the joint request by everybody, of course, that's okay with me.

Is that a joint request or not?

MR. KAMINSKY: Yes.

MR. BONNER: Yes, your Honor.

THE COURT: That's a joint request. Okay.

MR. GOTEINER: What we would recommend to the Court is that since the papers are drafted and signed, we could submit them to the Court and allow the Court to consider them for as long as the Court needs. We obviously don't want to lose the jury from plaintiffs' point of view.

THE COURT: Needless to say, yes.

MR. GOTEINER: So, we would ask the Court to review [8259] the papers, suspend closing argument for a couple of days to see if the Court would grant preliminary approval, and if not, we would proceed with closing argument.

Appendix B

It doesn't seem to make sense to the parties to require the jury to sit here if the case can be settled.

We appreciate it's late in the day. That's sometimes the nature of these sorts of settlements. It's unusual.

MR. ANDERSON: If I may add something, your Honor, just because we knew that the Court's reaction would be exactly what it was, because we know of your concern about the jury.

This is a lengthy document. The devil is in the details. Every sentence of the document has been negotiated. We have not been working on it, those of us from San Francisco. We have people in San Francisco that have been doing it and the defendants have had Cravath, Swaine & Moore working on it. So it is a finely-honed document, but there are a lot of subtleties and intricacies.

THE COURT: Have the attorneys' fees all been worked out?

MR. ANDERSON: The language — well, the Court decides only if attorneys' fees —

THE COURT: Right. But do we know what the amount is that's being requested, what percentage of the total recovery that would represent?

MR. ANDERSON: Yes, your Honor. Not more than a [8260] percentage.

THE COURT: Yeah. Well, what is the percentage?

MR. ANDERSON: 33 percent.

THE COURT: Out of $40 million?

MR. ANDERSON: Yeah.

MR. GOTEINER: Plus costs.

THE COURT: Yeah. How much are the costs?

MR. GOTEINER: Your Honor, right now we'd rather not disclose that information, obviously, because we don't have a settlement.

THE COURT: Well, you must have disclosed it to Cravath, Swaine & Moore.

MR. GOTEINER: I don't think we have actually, your Honor.

MR. KAMINSKY: Yes, you have.

MR. GOTEINER: Did we? I wasn't at all involved in talking with Cravath, Swaine & Moore.

MR. ANDERSON: We have people in San Francisco and New York involved in it.

MR. KAMINSKY: I heard a number but I wouldn't want to say that's the number because I heard secondhand from my cocounsel in New York at Cravath.

MR. ANDERSON: We looked into the kind of fees that could be awarded, your Honor, but the Court can grant as much as it chooses. But where we have done as much as we have, not [8261] more than 33 percent is well —

THE COURT: I just want to get an idea of what the round numbers are and what the percentages look like. Yes, 33 percent is not an unusual percent in class actions generally, but, you know, it has to be looked at in relationship to what the class recovery was, what the exposure was in the case, the likelihood of recovering, et cetera, et cetera, et cetera.

MR. GOTEINER: We can briefly go through the terms, if your Honor wishes.

THE COURT: Well, I have to tell you, you know, it remains my — I think that probably this is the best we can do today, because — well, if you all were not involved in negotiating the settlement, you all can disclose. This was not a distraction to you.

MR. GOTEINER: Your Honor, we can do closing argument if the Court wishes. But we think in terms of judicial time, economy and also focusing on settlement, it would make sense to suspend argument for a day or two until the Court just reviews it — and the Court will need time to review the papers — and if the Court disapproves it, then we could proceed later this week.

* * * *

APPENDIX C — VOLUME 55 OF TRANSCRIPT OF TRIAL PROCEEDINGS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED JANUARY 31, 1997

[commencing at page 8321]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 90-6863-Civ-UNGARO-BENAGES

WILLIAM WATERS and LINDA BARTHOLOMEW,

Plaintiffs,

– v –

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, MULTIVEST REAL ESTATE, INC., S.S. MELBOURNE, INC., and THE CYPRESS GROUP, INC.,

Defendants.

Miami, Florida
January 31, 1997
9:30 a.m.

VOLUME 55

TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE URSULA
UNGARO-BENAGES
U.S. DISTRICT JUDGE, and a jury

* * *

Appendix C

[8322] * * *

(Call to order of the Court)

THE COURT: Okay. Good morning. I think we better get appearances this morning. Who is here for the plaintiffs?

MR. COOPER: John Cooper of the firm of Farella, Braun & Martel.

MR. GOTEINER: Neil Goteiner of Farella, Braun & Martel.

MR. WISOFF: Brandon Wisoff of Farella, Braun & Martel.

MR. NEWMAN: Jeff Newman of Farella, Braun & Martel.

THE COURT: Okay, fine. And for the defense.

MR. DODYK: Paul Dodyk of Cravath, Swaine & Moore.

MR. KAMINSKY: Martin Kaminsky of Pollack & Kaminsky.

MR. BONNER: Larry Bonner of Homer & Bonner.

THE COURT: Fine. You can all have a seat. Now, the reason we are all here is for the Court to take up the [8323] stipulations of settlement that's pending before the Court for preliminary approval.

Appendix C

Let me first say that I've been over everything, including all of the changes that were made this week. I think I understand the transaction. I would like the plaintiffs, however, to go through it with me one more time and talk a little bit about the thinking that has gone into all of this.

MR. COOPER: Thank you, your Honor. My name is John Cooper with Farella, Braun & Martel. I'm appearing as settlement class counsel on behalf of the class.

In about September, when this matter was starting trial, Mr. Dodyk and I started conversations to explore the possibility of settling this matter, and over the course of the months since then, we have reached agreement on all of the documents that are necessary to settle a Rule 23(b) class action, which includes the stipulations of settlement and the amendments that your Honor mentioned, the notice, the orders for preliminary approval, the summary notice.

In addition to that, your Honor, we negotiated the amount of the consideration, and we have agreed to a settlement in the amount of $40 million, which is made up of $10 million cash, which has been paid this morning, or will be paid after your Honor indicates approval, plus $30 million in promissory notes that would go to the class members that would bear the rate of interest that's offered by the National Bank of Detroit [8324] on certificates of deposit up to $100,000.

Mr. Dodyk and I addressed this issue, the issue of the interest rates, in chambers this morning with your Honor; and by telephone communication with the bank, it was

resolved that rate is 5.37, which yields 5.50 annual rate of interest.

I would like to preface my comments by saying that we have signed documents for the stipulations of settlement and two amendments to the stipulations of settlement. So, nothing that I say here is intended to alter any of the contents of the signed documents, including the business documents that support that promissory note and the other security items.

In addition to the $10 million plus the $30 million in promissory notes, the defendants and settlement class counsel have agreed to cooperate to obtain payment of any remaining funds held by the receiver to be paid into the settlement fund, but that will not in any way reduce the obligation to pay the $40 million, your Honor.

There were a lot of consideration that went into these lengthy negotiations.

THE COURT: Before you get into that, perhaps you could review for me the security for the $30 million in promissory notes.

MR. COOPER: Yes, I will turn to that immediately, your Honor.

For the $30 million, the initial note is a master [8325] promissory note for $30 million that will be held by the settlement administrator, which is an obligation of Defendant James Grosfeld, and it is secured by marketable securities that will be posted this morning by Mr. Grosfeld in the amount of $47,700,000 as a minimum, your Honor.

Appendix C

It's our understanding that will be posted in the form of Pulte Corporation stock. If there is any default in the obligations under the stipulations of settlement, the settlement administrator is authorized to liquidate that security to the extent necessary to pay down the promissory notes; and if there is a default, the promissory notes will immediately become due and payable, to be paid out of that source.

The stipulations of settlement provides that within 30 days of the day of preliminary approval, an irrevocable letter of credit on the National Bank of Detroit will be issued to secure the $30 million obligation, which is first the $30 million obligation on the master promissory note, but as the claims procedure — which I will explain — is carried through to identify the authorized amount for the various class members, then the promissory notes will be issued to the individual class members which will bear the same rates and terms as the master promissory note, which is the interest rate that I referred to above.

Those promissory notes are irrevocable and will [8326] receive the interest paid annually on December 15th. They will receive checks for that interest on December 15th of each year. With the payment of the fourth interest payment, the class members will be notified that by giving notice no longer than a year and no less than 15 days prior to the anniversary, the fifth anniversary of the issuance of notes, they can ask for those notes to be paid on the fifth anniversary with the interest up to that date.

If the class members do not make that request, your Honor, the notes will renew at the same interest rates for

another five-year period and will be paid without further notice at the end of the next five-year period, for a total of ten years.

In the event that there is a default under the stipulations of settlement or under the promissory notes, the class members who are holding these notes will be able to draw on the letter of credit issued by the National Bank of Detroit. That letter of credit will be in the form of continuing one-year letters of credit that must be renewed 60 days prior to the time that they are to expire.

If they are not renewed within that period of time, then the notes will become due and payable and the class members can draw on the letter of credit during that period of time to receive payment on the promissory note.

So, we believe, your Honor, that that is ample [8327] security for these promissory notes. These are, in effect, as we have discussed earlier, certificates of deposit that bear rates, interest rates, at the same rate as a certificate of deposit of the National Bank of Detroit.

The claims procedure process is that notice which has been approved and included in the settlement package will be mailed to the class members. They will be given 60 days from the date of mailing in order to file their claim. The claim form is included in the package of materials and has been agreed to.

The claim form provides that the information to be inserted in the claim form will be taken from the monthly

statements of the class members, the claimants, from MultiVest, Incorporated, or IPMC. If the class members do not have their monthly statements, they can either call the settlement administrator on the 800 number which is set forth on the claim form or they can write to the claim administrator and receive copies of their monthly statements.

If a class member requests the assistance of having his monthly statements copied and sent to him, there will be a $50 charge for the administration service.

The settlement administrator will review the claim forms as submitted to confirm that the information conforms to the information that is contained in the monthly statements. If the claim form is erroneous but can be conformed and can be [8328] corrected to reflect the correct information that's contained in the monthly statements, the settlement administrator will make those corrections.

The settlement administrator will not reject any claim form that is capable of being corrected to conform to the information that's set forth in the monthly statements. In the event that the settlement administrator concludes that the information set forth in the claim form does not conform to the requirements of the claim form, then the settlement administrator will notify the class member and provide the class member with a statement as to why the settlement administrator believes that the claim does not conform and will provide the claimant 20 days in which to respond and correct it.

In the event it is not corrected within that period of time, then it can become a disputed claim and can be presented to

the Court in the settlement administrator's report to the Court. So, there will be then an opportunity for the Court to review any of those claims in the event that there are disputes over that.

I should clarify, your Honor, that the $50 charge for obtaining monthly statements will be deducted from the class members' recovery. It will not be a charge in addition to the class member. There will not be a charge, a specific charge, to the class member. It will merely be a deduction from what [8329] the class member recovers.

Your Honor, there were a lot of considerations, a lot of analysis that went into our evaluation of this settlement and into our recommendation, as settlement class counsel, to recommend to your Honor that you approve the settlement on behalf of the class.

One of those considerations is the fact that this is an action against, in effect, an individual: Mr. James Grosfeld. Mr. Grosfeld testified under oath in this court that his net worth is approximately $100 million. Since that time, your Honor, he has filed, pursuant to your Honor's request, a financial statement stating that his total net worth is approximately $101 million. That was one of the events that has occurred in communication with your Honor since Monday.

This settlement of $40 million is a significant portion of that total net worth of Mr. Grosfeld. That was a consideration here. There is no insurance, as we understand it, for these claims. The sole source of recovery for any judgment would

be Mr. Grosfeld's assets. The personal net worth of Mr. Grosfeld of approximately $101 million was a consideration, given the fact that the total claims in this matter were $119 million, with a possibility of trebling a portion of those damages, plus prejudgment interest, which could have been an enormous amount of money.

We took into consideration the source of recovery [8330] from the potential sources of recovery of any judgment taken in this matter. Your Honor, the amount of the recovery here, $40 million, is approximately one-third of the total damages presented in court of $119 million. We believe that after the deduction of attorneys' fees, expenses and administration expenses that the payment to the claimants will be approximately 20 percent of their out-of-pocket losses.

Your Honor, we have studied and we tendered to your Honor the NERA Report, and we would like to make that a part of the record in this matter. It is a study of recoveries in class actions in the United States.

The 1996 NERA Report — and I'm speaking from memory now — shows some recoveries, and the average and the median recovery is in the range of approximately 9 to 10 percent of the total losses.

This settlement, your Honor, is a third — a third — of the out-of-pocket losses and 20 percent recovery to the class of their out-of-pocket losses after deduction of the attorneys' fees, which we will request, and have requested, of one-third of the recovery plus expenses.

I will address that in a minute.

This is a very significant recovery, your Honor, we believe, considering the source of funds to pay a judgment. This is a very significant recovery, your Honor, considering other class actions that are settled in the United States.

[8331] I would like to review a few things.

When this matter was first presented on Monday, it was discussed on the record by Mr. Goteiner and Mr. Anderson. Since that time, Mr. Dodyk and I arrived in Miami and met with you on Tuesday. We spent a substantial amount of time reviewing this with your Honor off the record in chambers; and as a result of our discussions with your Honor and responding to many of the concerns that you had, you will see that there are two amendments to the stipulations of settlement, one of which addressed the first round of concerns that your Honor addressed to us, and the second, which was executed yesterday, addresses a second round of concerns that your Honor had.

I have executed those amendments on behalf of the settlement class, and I will represent to your Honor that Mr. Lipoff and the Zuckerman firm have authorized me to inform you that we will provide you with executed signature pages on their behalf shortly.

One of the concerns that your Honor had related to the collateral and the security. In response to that, the arrangement was made to provide for the marketable securities in the form of common stock to be 150 percent of the outstanding debt of $30 million plus interest thereon. That has been done, and your Honor will see when we speak

with the settlement administrator this morning that he will confirm the amount of money or amount of stock that is being transferred to [8332] secure this, which reflects your Honor's concerns.

Your Honor was also concerned about the period of time when the letter of credit would come into place. Initially, what we had negotiated was for the letter of credit to come into place 120 days after preliminary approval, and in response to concerns of your Honor, we have agreed with defendants that the letter of credit would be put into place 30 days of the preliminary approval.

An additional item, your Honor, is that plaintiffs' settlement counsel and plaintiffs' counsel of record have waived their right to appeal. Timing and the form of our fees, as opposed to the amount, we are granting your Honor. Obviously we are waiving our appeal and leaving that flexibility in your Honor's very good hands, we believe.

Your Honor was concerned about additional elements that related to the finality of the settlement. You will see those are, likewise, reflected in the amendment documents that are Amendments 1 and 2 to the settlement agreement.

Your Honor addressed several issues where you were concerned about insolvency and potential bankruptcy as that might affect the quality of the security, and those concerns are also reflected in the amendment to the stipulations.

THE COURT: Perhaps either you or Mr. Newman could just review, very briefly, how you saw the potential insolvency issue with respect to the letter of credit.

Appendix C

[8333] MR. COOPER: I will call on Mr. Newman to do that, your Honor.

THE COURT: Okay.

MR. NEWMAN: My name is Jeff Newman.

Your Honor, we did, in both negotiating the settlement and also in following up on concerns raised by your Honor, look at issues related to the letter of credit and the potential for insolvency on that. We concluded as follows: One, we obtained, through the assistance of your Honor, representations from Mr. Grosfeld, not only as to his net worth, but also to the effect that he has no outstanding other obligations other than potential tax liabilities, and, therefore, we concluded that there was very little risk of insolvency.

Moreover, we concluded that once the preference period had elapsed and we had our initial security in place, and notwithstanding whatever collateral was posted, that would not constitute any kind of voidable transfer and, therefore, we felt on behalf of the class that they would be adequately protected against these insolvency risks, and we thank your Honor for being so concerned about it.

THE COURT: Thank you.

MR. NEWMAN: Maybe I could add one more thing. We understand that notwithstanding what Mr. Cooper said about the minimum amount of collateral, that we will find actually that [8334] Mr. Grosfeld has actually pledged 1,700,000 shares of Pulte stock, which we will find the value

of today, but is considerably in excess of 47,700,000, which he agreed to provide. So there is quite adequate collateral that has been posted in the interim.

MR. COOPER: Your Honor, just a couple of additional items I would like to draw to your Honor's attention with regard to the settlement. One relates to the claim form. We believe that the fact that the class members can pick up the phone and make a toll-free 800 call to the settlement administrator to answer their questions and to obtain assistance and to obtain monthly statements is a tremendous benefit in terms of resolving this.

Your Honor expressed interest and reviewed the claim form in chambers when we reviewed this, and we all agreed that the 800 number would provide some benefits to the class members. Also, I drew to your Honor's attention in chambers, and I believe we would like to place on the record, the fact that the agreements, the stipulations, provide that exchange-traded option positions that were opened at the end of the class period, which was October 31, 1989, the value of those positions still open on that date will be deducted from the claimant's claim in the settlement.

Now, I draw that to your Honor's attention because that is different than an order that your Honor has entered in [8335] the trial, but for settlement purposes, the defendants and the plaintiffs and the class counsel have agreed to that, and I just wanted to underscore that on the record.

Sections 2 and 3 of the claim form are where this information is set out. Section 1 is just basically where you

get the information, name and address, et cetera. Section 2 is a cash-in/cash-out calculation. What did you pay into MOI or IPMC and what did you get back, and then the difference is totaled out in Section 2.

In section 3, open positions at the end of the class period, and transfers out, value transferred out, will be addressed and then that is totaled.

Your Honor, the last item is, we have agreed to some dates with regard to this procedure, that is that the settlement administrator has indicated to us — and has assured us, indeed — that he will be able to mail out all of the class notices within two weeks, and that's two weeks from today, which is February 14th, and we have agreed that objections to the settlement and the objections to our fee request of one-third of the settlement, plus expenses, will be filed 30 days from the mailing date, which we are assuming to be February 14th, which will be March 17th.

We have requested your Honor to set a hearing 45 days from the February 14th assumed mailing date, of March 31st, and the deadline for having the claims postmarked will be 60 days [8336] after mailing, which will be April 30th; and, your Honor, we are going to try to mail that out as soon as possible, but we need a date. So we have assumed the April 14th.

With regard to attorneys' fees, your Honor, I have already addressed the fact that we have filed this morning a waiver of right to appeal with regard to the form of the attorneys' fees, but I should also state on the record that we

will request that your Honor award us attorneys' fees in the cash portion of the settlement so that we would be paid in cash to the extent possible. However, we believe that any award of attorneys' fees will contain a significant portion of an obligation by the settlement administrator to us. So, we will share, under any circumstances, we believe, very substantially with the class in the time-extended payment that I've already described to your Honor.

If your Honor has any questions, I would be happy to respond to those.

THE COURT: Well, first, let me turn to Mr. Dodyk and the other defense counsel and see if there is anything in particular that they wish to add.

MR. DODYK: Your Honor, I think Mr. Cooper has accurately described the settlement procedures. We have nothing to add except for the fact that I believe that under the stipulations, the proof of claims were to be filed within 60 days after the mailing, which is, by my calculation, April [8337] 14th.

THE COURT: I believe it's — well, we can look. I thought it was 45 days of mailing. In fact, we had discussed that specifically in chambers.

MR. COOPER: My calculation was it was 45 days for the hearing.

THE COURT: You are right.

MR. COOPER: Then 60 days from the mailing for —

THE COURT: Let's go back and look. Which exhibit is that?

MR. DODYK: Your Honor, I think the relevant entry shows date blanks, but we had agreed to a 60-day period between mailing and the submission of the claims. So I think that works out to April 14th, if I'm not mistaken.

THE COURT: Right.

MR. COOPER: Yes, your Honor, my calendar tells me that April 14th is the 45th day of the year. So, 60 days to there would be the 105th day, which my calendar tells me is April 15th.

THE COURT: The mailing of the notice, it is agreed upon it will be in two weeks, is that right, but the notice will be mailed by February 14th?

MR. DODYK: Yes, your Honor.

THE COURT: The objections will be filed in 30 days after the mailing of the notice, which is March 17th; is that [8338] right?

MR. COOPER: Yes.

THE COURT: The postmark date of the cutoff of claims will be?

MR. DODYK: I think we now have narrowed it down to April 15.

THE COURT: April 15.

MR. COOPER: Yes, your Honor.

THE COURT: And the hearing for approval?

MR. DODYK: We had requested for March 31.

THE COURT: March 31.

MR. DODYK: Yes, your Honor.

THE COURT: Okay. Anything else you want to talk about, Mr. Dodyk?

MR. DODYK: No, your Honor.

THE COURT: Mr. Cooper, you didn't talk about this. Maybe Mr. Goteiner would like to speak to this, but I do think this is a relevant consideration that we all ought to get out on the table, which is what this litigation would look like if it were to continue and how that fit into the settlement.

MR. GOTEINER: Well, I think defendants would make a representation as to what would happen under certain scenarios. I can assure your Honor, we are plaintiffs to win a jury verdict for the full amount of the losses. There would be a host of appellate issues that defendants would be taking up [8339] to the Eleventh Circuit, and if they could, to the United States Supreme Court.

THE COURT: In fact, I had committed to the defendants that before we went any further in this proceeding and before judgment was entered and before the bifurcated issues were resolved and provided there was a verdict for the plaintiffs and Mr. Grosfeld gave me assurances as to not transferring his assets, I would permit an appeal to the Eleventh Circuit because of all of the novel issues in the case.

MR. GOTEINER: I wasn't trying to speak for the Court, but the Court has indeed told us that in writing, something quite close to that, previously. So, we could have expected at least a full, from my recollection, two years just to resolve many of these issues, and then, of course, the interesting questions as to what would be happening under the CEA claim, depending what happened to the boiler room claim, and that would have led the Court to consider and decide upon a whole litany of novel ideas of how you deal with a case like this where you have to rebut the reliance presumption, and there's been much discussion in this case about the Knapp case being one procedure.

The Court never decided one way or the other whether it was going to adopt that procedure.

I should also point out by way of background, looming [8340] over this entire case has been the novelty that the Court has mentioned. Mr. Kaminsky, on behalf of defendants, has pointed out to the Court the changing law in this area, and I'm sure he could cite chapter and versus Third Circuit cases and various other cases that have come down on certification issues.

I should also say there is a sharp distinction in this case, a fraud-in-the-market case, by contrast, to a class certification, which are a cakewalk. So, there was a host of these issues that the Court has been struggling with for some years, and the Eleventh Circuit would still be struggling with.

So, in consideration of all of those issues and the promise of a lengthy appellate process, from plaintiffs' point of view, at least, this was a terrific arrangement, and given what Mr. Cooper has already said on the record, getting back for this class that has an average of $6000 loss per class member 20 percent, were the Court to grant the administration fees and costs that plaintiffs requested, and I think that covers the essentials of plaintiffs' view on what the future would hold for this case as opposed to the certainty that would occur were the case resolved now.

THE COURT: Okay. Well, unless there is anything you want to add on that subject, Mr. Kaminsky, or Mr. Bonner . . .

MR. BONNER: No.

THE COURT: Let me make a few comments. As we all [8341] know, we came in here Monday morning — I came in here Monday morning thinking we were going to have closing arguments. I got in very early to make a few little changes to the jury instructions. The phone was ringing off the hook. I didn't want to take the time to answer it.

Finally, one of my law clerks got in about 8:30 and answered it, and it was Mr. Goteiner on the phone saying

the parties have reached a settlement. My law clerk can speak to the fact that I threw my pen down on my desk and I was enraged.

After five months of trial, to think that it would be so easy to settle a case like this was a little disorienting for me, but of course everyone did recognize that settling a 23(b) class action is not a simple matter, and it requires notice to the class members, it requires a fairness hearing and it requires all kinds of proceedings that we needed to address.

Now, on Monday, court convened and litigation counsel attempted to outline for me what the terms and conditions of the settlement were; but unbeknownst to me, Cravath had stepped in for Mr. Grosfeld and had been negotiating, unbeknownst to me, with Mr. Copper, who I had never heard of until Monday, and it seemed as though what was going to be necessary was for the lawyers who had actually negotiated the settlement to fly in to meet with me and discuss it in more detail.

[8342] I made some comments on Monday after hearing what the terms of the stipulations were without having read it, which I now regret having had the opportunity to read it in detail and having had an opportunity to meet with the lawyers and to reflect on the agreement and hopefully to improve it somewhat. So, I apologize for my comments concerning cutting and running.

The other side of that is, the lawyers had something of a challenge in convincing me that the economics of the settlement were as good as they were representing them to

me to be, but both sides did a very good job of presenting me with their experience and the national experience in the resolution of class actions such that really I would be very hard-pressed to take the position this was not certainly within the range of reasonableness.

$40 million does represent a very substantial percentage of Mr. Grosfeld's net worth, and even if you want to look at it in terms of total losses with prejudgment interest, it still represents a very substantial percentage of recovery.

Of course, an aspect of the settlement involves the timing. The terms of the settlement at a very basic level involve the payment of $10 million in cash and with the $30 million payable over time. It would have been nice to be able to send the class members all of their money up front, but I think that the compromise that has been struck here is a [8343] practical and realistic solution, given the fact that what we are dealing with here is a situation where there is no insurance and we are dealing with an individual's net worth.

Now, because of the time aspect, though, I was, as Mr. Cooper said, extremely concerned about the security. We worked very hard all week to try and improve the agreement to tighten up that aspect of it in every respect, and I am satisfied that we have done as good a job of it as we can and that the risk to the class members is very minimal.

I know that the plaintiffs intend to seek their fees out of the cash portion of the settlement, but I have expressed to Mr. Cooper, and Mr. Cooper understands, that the attorneys

will have to share some of the risk with the class members, and in all likelihood, although I don't want to take an absolute position on this at this time, a very substantial portion of the attorneys' fees and costs will end up being deferred over the same period of time as the class members' payments will be deferred.

Now, of course, one of the very significant reasons why I am persuaded that the settlement is a good settlement, assuming that conditions that are contained in the agreement are complied with this morning, is that the securities are deposited and that the securities and cash have been deposited and the fact that this litigation would probably have gone on another three to four years, at least.

[8344] As I said earlier, the case raised a number of novel issues in a lot of ways. It was like trying to hammer a square peg into a round hole. Regardless of who would have prevailed in this particular proceedings, I believe that there would have been appeals. Those appeals would have taken to the Eleventh Circuit numerous novel issues.

I don't think I have ever seen a case that had so many novel issues in it, and it undoubtedly would have taken at least one, if not more, certified questions to the Florida Supreme Court. So, the lawyers would have had to litigate the appeal both in the Eleventh Circuit and in the Florida Supreme Court, and who knows how long that would have taken, especially on a record of this size. The record is very substantial after all this time in trial.

One of the reasons I didn't allow the 1292(b) appeal before was because I felt that in order for the Eleventh Circuit

to really understand this case, they needed a full factual development of what the plaintiffs' position was.

So, litigating an appeal on a record of this size is an extremely time-consuming exercise. I doubt very much there would have been a resolution of that appeal for 18 months to two years; and then if there had been a plaintiffs' recovery and that would be affirmed, we would had to go on and deal with this problem of the bifurcated issues, which undoubtedly would have ended up in another appeal.

[8345] So, I think we were looking at least to three or four years of more litigation, if not more, and with the outcome, at every step of the way, tremendously uncertain. So for all of those reasons, and provided that the securities and the cash are in place, I am prepared to give preliminary approval.

The only other thing — there is one other thing that I want to say, and that is that — and I'm not exactly sure how this fits in with the preliminary approval this morning, but I must say that I have never been exposed to a case, not in my practice and not as a judge, that was more contentious than this case. Not necessarily contentious in a nasty way, but there was not an issue in the case that was not contested.

It has been extremely time-consuming for everyone to litigate this case. So, at this point, unless there is something someone feels that I've left out that I haven't addressed, I think that what we ought to do is make the call to the — I guess it's to the settlement administrator, or is it to Cravath?

Appendix C

MR. DODYK: To Cravath, your Honor.

THE COURT: To make sure that the cash and the securities have been delivered.

MR. COOPER: I have one housekeeping matter.

THE COURT: Sure.

MR. COOPER: That is to confirm that we do have a hearing date on March 31st if that's available.

[8346] THE COURT: Let me get Catherine in here. How much time do we think we need to set aside? Should we set aside the whole day just in case?

MR. COOPER: I don't believe, and my experience would indicate, your Honor, that it would not take the whole day. I would believe the morning would be adequate.

THE COURT: We will set aside a half a day.

MR. COOPER: Also, your Honor, with regard to briefing on our attorneys' fees petition, how would you like us to do that and dates?

THE COURT: Let's see. First of all, March 31st is totally open. So, we will set this for the morning of March 31st for the hearing on the final approval of the settlement.

MR. COOPER: At?

THE COURT: At 9 o'clock. Actually, let's make it 9:30. How long do you believe it will take to put together your fee and cost petitions and the briefing that would go with it?

MR. GOTEINER: Three weeks, your Honor.

THE COURT: Three weeks. So, that would be, say, February 21st?

MR. GOTEINER: Yes, your Honor.

THE COURT: Is that okay?

MR. GOTEINER: Yes, your Honor.

THE COURT: Then I guess you all can respond, if you [8347] want to respond, within the time provided by the local rules, and hopefully we can avoid a reply because it will take us up pretty close to the hearing date, okay?

MR. GOTEINER: That's fine, your Honor.

MR. COOPER: Thank you, your Honor.

THE COURT: Okay. All right. Now, the arrangement is, I take it — maybe I should have paid a little more attention to this, Mr. Dodyk. The cash and the securities are being delivered to Cravath in escrow, to be delivered to the settlement administrator?

MR. DODYK: They are in the possession of Cravath at the present time, in the person of an associate by the name

of Scott Yut. The settlement administrator is in the office with him. I have given the clerk the telephone number.

THE COURT: Hello, Mr. Yut. This is Judge Ungaro-Benages in Miami. Can you hear me?

MR. YUT: Yes, I can.

THE COURT: Okay. We are all in open court, as is your voice.

MR. YUT: Okay.

THE COURT: Okay.

MR. YUT: I can hear you.

THE COURT: I am simply calling to confirm that you have delivered to the settlement administrator $10 million in cash, and you tell me how much in Pulte securities.

[8348] MR. YUT: I have delivered a million 555,000 shares of Pulte Corporation which, based on yesterday's closing price, is worth $50,762,500.

THE COURT: Could you say that again? You were kind of — your voice is breaking up a little bit on the speaker.

MR. YUT: All right. A million 555,000 shares of Pulte Corporation, which is currently valued at 50,762,500, and another 150,000 shares of Pulte Homes Corporation for which this morning we were unable to obtain an exact quote, but it's not widely traded.

THE COURT: Mr. Dodyk, are you able to repeat that back to see whether we got that correctly or not?

MR. DODYK: May I approach?

THE COURT: Please.

MR. DODYK: Scott, could you state as clearly as possible the value of the Pulte stock?

MR. YUT: 50,762,500.

THE COURT: Fine. Yes, Mr. Newman?

MR. NEWMAN: Mr. Yut, could you tell us the name on the stock certificates for the other stock certificates, please?

MR. YUT: Yes. Just a moment.

MR. BUCHBAND: This is Peter Buchband, your Honor.

THE COURT: Fine.

MR. BUCHBAND: The other company is identified as [8349] Pulte Homes Corporation, and if you like, I can give you the number that identifies the security.

MR. NEWMAN: My understanding from Mr. Ormsbee, who is at Cravath, is that actually the Pulte Homes Corporation is actually just the former name of Pulte

Corporation and, in fact, what you hold is really 1,700,000 shares of Pulte Corporation stock. From the certificates, you can't tell that, but I understand that's in fact what you hold.

MR. BUCHBAND: Okay, I was not aware of that.

MR. NEWMAN: That's okay.

MR. DODYK: Scott, what is the total number of shares that you have of the two companies?

MR. YUT: 1,700,000.

MR. DODYK: If you were to multiple that times the stock price for Pulte currently on the market, what is the total value?

MR. YUT: We will do that right now.

MR. DODYK: We are waiting for you.

MR. YUT: 55,675,000.

MR. DODYK: Thank you.

THE COURT: Okay. All right. Well, I am satisfied that the conditions that are contained in the agreement have been complied with.

Do you agree, Mr. Cooper and Mr. Newman?

MR. NEWMAN: We do, although I would like to have one [8350] thing confirmed.

Mr. Yut, you are prepared, as immediately as the Court has approved this order, to wire transfer to Garden City the $10 million you hold in your trust account; is that correct?

MR. YUT: That's correct.

MR. NEWMAN: And you will do so now?

MR. YUT: That's correct.

MR. NEWMAN: Thank you, very much.

THE COURT: Okay. Are we all set, Mr. Newman and Mr. Cooper?

MR. COOPER: We are.

MR. NEWMAN: We are.

THE COURT: Fine. Thank you very much, Mr. Yut.

MR. YUT: Thank you.

THE COURT: Okay. All right. Well, I am now going then to give preliminary approval to the settlement. I think the only order I have is the order that's in this book. Did someone have a loose order by any chance? Otherwise we will make a copy.

MR. COOPER: No, we don't, your Honor, but we believe the blanks in that order can be filled in now with the dates that your Honor has granted us.

THE COURT: Okay. Just a second.

MR. KAMINSKY: Your Honor, we will be happy to take [8351] one out for you.

THE COURT: Thank you very much. The first date appears on Page 9, and it says the Proof of Claims. This is the date for the proof of claims. So that should be April 15th, right?

MR. DODYK: Yes, your Honor. Page 12 I think is the next.

THE COURT: Right. At 9:30 a.m., on March 31st, will be the hearing for final approval.

MR. DODYK: Then Page 13, your Honor.

THE COURT: Right, is the cut-off date again.

MR. DODYK: Your Honor, that is the date for filing objections, and that is March 17, I believe.

THE COURT: Right. March 17th.

MR. DODYK: Then there is, of course, the date on the last page, which is today.

THE COURT: Right. Okay, and I am signing the order for preliminary approval at this time.

Okay, so that concludes this except for me to say that I appreciate very much the efforts that were made to resolve

the matter and very much the cooperation that I received this week in responding to my questions and dealing with my objections.

Yes, Mr. Goteiner.

MR. GOTEINER: Your Honor, I hate to have the last [8352] word, but on behalf of plaintiffs, I feel we must.

From the plaintiffs' side, and I think I speak for the defendants as well, we appreciate the incredible burden that this case over the years, as well as over the past six months, has put on the Court, the Court's staff, and it was a Herculean task for all concerned, but particularly for the Court. Far less people than we have, and we appreciate it.

THE COURT: You are welcome, but we all learned a lot. Thank you very much.

I feel compelled to point this out. Bill has given me a little crystal hourglass to sit up here forever and remind me of this case.

Okay. Now, do we have all of our jurors or not? We are missing two. Okay, well, I don't know that it's necessary, really — what do you all think? I don't know that it's necessary for you to be here when I discharge the jury. I am going to go and have a few words with them privately and personally to explain to them what has happened.

What's the consensus here? What's the feeling?

MR. GOTEINER: Your Honor, we have no objection at all to the Court doing that in any way the Court wishes.

MR. DODYK: For defendants, we have no objection.

THE COURT: You all are excused, and I will deal with the jury. They will probably become a little irritated, but I think I can live through that.

[8353] MR. GOTEINER: Your Honor, could you let the jury know, at least from plaintiffs' point of view, we would, if anyone wants to chat with us, talk with them, but obviously the Court would advise them they don't have to talk with any of us.

THE COURT: I'm going to let them know they are free to talk about the case if they want, and they are free to talk to the lawyers about it, and they are also free to keep to themselves.

MR. KAMINSKY: Your Honor, may we keep this to the lawyers rather than press and other people?

THE COURT: Yes. Although I can't order them.

MR. GOTEINER: We are asking the Court convey that the plaintiffs' attorneys would like very much to thank them.

THE COURT: I will thank them for all of you, okay?

MR. GOTEINER: And would like to speak with them as well. That's all.

THE COURT: Okay. Let me handle it.

MR. BONNER: Thank you, your Honor.

MR. GOTEINER: Thank you, your Honor.

THE COURT: If you will wait outside, we will get you conformed copies of the order. Thank you.

(Adjourned at 10:30 a.m.)

* * * *

APPENDIX D — EXCERPTS FROM TRANSCRIPT OF FAIRNESS HEARING OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED MARCH 31, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 90-6863-Civ-UNGARO-BENAGES

WILLIAM WATERS and LINDA BARTHOLOMEW,

Plaintiffs,

– v –

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, MULTIVEST REAL ESTATE, INC., S.S. MELBOURNE, INC., and THE CYPRESS GROUP, INC.,

Defendants.

Miami, Florida
March 31, 1997
9:45 a.m.

TRANSCRIPT OF FAIRNESS HEARING
BEFORE THE HONORABLE URSULA
UNGARO-BENAGES
U.S. DISTRICT JUDGE

* * *

[33] THE COURT: All right. So we'll go ahead and we'll proceed subject to the Court's review of that agreement.

Now, before we proceed further, I want to take a little time to review some of the relevant procedural history that's brought us to this juncture before we hear from the parties and the other individuals who are present who wish to be heard.

I gave preliminary approval to the settlement of the class action by my order dated January 31, 1997, and I want to note that that preliminary approval followed upon a week of intensive review and renegotiation of the terms of the proposed settlement between the Court, the parties' trial counsel and the parties' settlement counsel.

I also want to note that the proposed settlement as originally conceived was first presented to me on the morning of closing arguments after nearly five months of trial.

As I'm sure the attorneys for both sides recall, I wasn't very enthusiastic about the timing of their decision to resolve the case. After all, we had presumed upon the jury for many months and the jury was present and ready and willing to listen to the closing arguments and render a decision once and for all in the case as to whether or not there had been a scheme to defraud; whether or not MOI was a boiler room within the meaning of the law; and whether Mr. Grosfeld was responsible for it.

[34] I also was not very happy with the terms of the proposed settlement to the extent that trial counsel was able to outline those terms to me.

For example, I didn't like the idea that the class members would be compensated solely in the form of individual promissory notes that would not be payable any sooner than five years in the future, while most of the class counsel's fees and costs would be paid from the cash portion of the settlement fund.

I was also unhappy with the amount of security for the deferred obligation during the time preceding the delivery of the irrevocable letter of credit, and with the parties' apparent agreement at the time that a fee award of one-third of the $40 million settlement fund, which everyone at the time clearly understood to be approximately $13 million, was reasonable under the circumstances.

I distinctly recall, for example, the attorneys for both sides estimating that the net settlement fund which would be available for distribution to the class members after the fees and expenses were deducted and the administration expenses were deducted would be in the neighborhood of $24 million.

Now, as I have already noted, several days of discussions followed to deal with my concerns. During that time period the jury was not discharged because I was at all times prepared to go to verdict if a satisfactory agreement [35] could not be reached. However, by the end of that week sufficient changes had been made to the agreements to allay most of my concerns.

Additionally, the parties assured me that the terms of the agreement were sufficiently flexible to permit the deferral

of the attorneys fee and expense obligations in whatever amount I deemed appropriate.

As further assurance that I would be free to defer all or a portion of the fee and expense award, class counsel agreed to waive their right to appeal those aspects of the fee and expense award relating to the timing or method of payment.

I want to emphasize that in these discussions both sides went to some lengths to convince me that a settlement fund consisting of $40 million, albeit comprised of $10 million in cash and the balance in notes, less a fee award of one-third of the gross amount of the settlement fund and reimbursement of counsel's expenses, would produce an exceptional benefit to the class members.

Now, I'm not taking a position right now on whether or not I think it was an exceptional benefit or not, but that was certainly the position taken by both sides during that week of discussions.

These efforts on both sides to persuade me at least preliminarily of the significance of the result obtained in the case if the settlement were approved included comparative [36] analyses of settlements in other class actions alleging improprieties in the offer and sale of securities and other matters alleging fraud in the marketing of investments, and I directed that those analyses be placed in the court file and otherwise made a part of the public record, and I invite any interested person to review those documents which were supplied by both Mr. Dodyk for the defense and by class counsel.

Appendix D

Having received, reviewed and considered these materials and having engaged in extensive discussions with the parties concerning the terms of the proposed settlement, and in the end having been persuaded by both sides that there was nothing in the proposed settlement that was outside the range of reasonable and adequate, but reserving to myself the ultimate decision as to the fairness of the settlement and the amount of fees and expenses to be awarded to class counsel, I gave preliminary approval to the settlement by the order dated January 31, 1997.

On February 21st, 1997, following entry of the order, the settlement administrator, the Garden City Group, apparently mailed the court-approved form of notice to all class members who could be identified or, more specifically, 20,591 individuals at their addresses as then known to class counsel and as updated by the Postal Service's national change of address database reflecting all changes of address submitted in the last three years.

[37] In addition, the settlement administrator has reported to the Court that the Court-approved summary notice was published in the New York Times, the Wall Street Journal and USA Today.

I acknowledge that the settlement administrator has reported that approximately 7,000 of the claim packets, which included notice of today's hearing, were returned as undeliverable. That is, of course, not surprising in light of the fact that this litigation has been ongoing for some six years and the average individual claim in the case is between $6,000 and $7,000.

In any event, the Court is satisfied that the notice given, including the notices published in the newspapers of national circulation, was the most reasonable and practical under the circumstances and was also customary in the administration of class action settlements.

I also note, however, that efforts are, according to the settlement administrator, ongoing to mail claim packets to the class members whose packets were returned as undeliverable.

That came about not because of the efforts initiated — not because of efforts initiated by the settlement administrator, as I understand it, but because pursuant to the request of class counsel the Court ended up ordering the settlement administrator to contract with another vendor to obtain updated addresses.

[38] Since then the settlement administrator has advised the Court that that vendor has supplied 4,743 updated addresses to which claim packets were recently mailed, and that additional updated addresses are expected shortly.

Now, having found that the best notice that was reasonable, practical and customary in the circumstances has been given, this matter is now ripe for final approval of the settlement and the other matters that I outlined at the commencement of this hearing.

To set the stage for how I wish this hearing to be conducted, I next wish to review the terms of the notice which govern the participation of class members at this hearing.

Appendix D

The notice specifically required that any class member opposing the settlement, including class counsel's request for fees and expenses, to have notified the Court and the parties of his or her opposition by March 17th, 1997 by, first, filing with the clerk of the Court a notice of such person's intention to appear together with a statement indicating the basis for his or her opposition along with any supporting documentation; and, second, by serving copies of such notice, statement, documentation and related papers or briefs upon plaintiffs' settlement counsel and defendants' counsel, Martin Kaminsky.

Now, until this morning I was aware of only one communication which had been received in response to the notice [39] which stated any opposition to the proposed settlement, and that communication was in the form of a pleading submitted by Carol Orkin, who I understand is present here in court.

Maybe Ms. Orkin can stand so I know who she is. You're Ms. Orkin. Okay. Fine. Thank you. You can have a seat.

Now, Ms. Orkin set forth several — well, three grounds on which she was objecting to the terms of the settlement. I don't know that she's objecting to the settlement in its entirety, but she was objecting to certain terms of the settlement, and she, true to her word, is here today to make her feelings known, and at an appropriate time I'm going call on Ms. Orkin to come forward so that she can state what her position is with respect to the settlement.

Now, this morning it was brought to my attention that there is present here in court an individual named Christopher Madden. Where is Mr. Madden?

(Raises hand).

Okay. And Mr. Madden contends that on March — I guess — he provided me with certain documents and I think copies have been provided to counsel. The letter states that he provided to me that's directed to the clerk of the Court: "I plan to attend the settlement hearing on March 31 to learn more about my standing in the class action suit against MultiVest to verify that I have been given proper priority [40] within the class and find out more details about the class, the distribution and the plan of allocation. I plan to present evidence of a previous settlement signed by the vice president of MultiVest Options." And he enclosed a release that he had executed as a result of a reparations proceeding, I take it, that he was involved in with MultiVest Options.

Now, what is the position of the — I must tell you, Mr. Madden, that I suspect that you are — I did not have a chance to really get into this because I only received this this morning, for some reason. But in looking at your release, I suspect that you are excluded from the class.

But, what is the plaintiffs' position on this?

MR. GOTEINER: Your Honor, we'd have to go back to the ruling. But I do provisionally believe that the language in the release may mean he's excluded. I think this is the magistrate's — the Special Master's ruling, which was affirmed, but I'm not sure.

MR. NEWMAN: Your Honor, if I might speak. I don't know that we actually represent Mr. Madden, but Mr. Madden told me he never received the $1,900 referred to in his letter. So it may or may not be that he was released. We just don't know the facts.

THE COURT: Okay. So, what is the plaintiffs' position on whether or not — well, let me ask Mr. Madden.

Mr. Madden, do you wish to be heard today or are you [41] simply hear to listen and to find out?

MR. MADDEN: Well, I'd like to be heard, but I'm not sure what I'm going to say.

THE COURT: Okay. Well, that's fine. Have a seat.

Well, what do you all think? Should we at an appropriate time let Mr. Madden speak or not?

MR. GOTEINER: Why not, Your Honor?

THE COURT: And what do the defendants say?

MR. DODYK: Your Honor, I don't have any objection to that.

It occurs to me that this may be a nonclass problem in that it sounds like Mr. Madden has an unsatisfied claim against the receiver for $1,900, which is outside the class. But the receiver may have a view on that.

THE COURT: Okay. So maybe we need for the receiver to — when the receiver returns, we'll revisit Mr. Madden's situation.

Okay. Now, the only other communication apparently which the attorneys received that was not in the nature of an opposition but more in the nature of an inquiry, which was from Mr. and Mr. Dorsey in Chicago, Illinois, who I take it are not here. Are the Dorseys here? The Dorseys are not present.

And they apparently had an account with MOI that straddled the end of the class period, and inquired whether they could recover for money lost in transactions after [42] 10-31-89.

So, although the Dorseys aren't here, I would hope that class counsel would explain during their presentation the rationale for the exclusions of the transactions subsequent to 10-31-89.

Now, let me also note before we proceed further that class counsel have now submitted their fee and expense petitions. Counsel is requesting one-third of the settlement fund as their fee and also $2,665,000 in expenses.

Now, I do want to note that the settlement's stipulation that the — excuse me, that the fee request of one-third of the settlement fund is the maximum amount of fees that the parties agreed — the parties, that's both sides — agreed could be sought pursuant to the settlement stipulation that the Court approved at the end of January, after being assured by both

sides that a fee of one-third of the gross amount of the settlement fund would be well within the range of reasonable.

Moreover, as part of the stipulation — and it's also in the order giving preliminary approval to the settlement — defense counsel agreed not to oppose the fee and expense application so long as the application did not exceed a request for a one-third fee — that's one-third of the settlement fund — plus expenses.

Now, I also want to note that I am far from committed [43] to paying — to the payment of the fees and expenses with 25 percent in cash and 75 percent as a deferred obligation that the plaintiffs' counsel has more recently proposed.

My preliminary view, although, again, I want to hear from everyone today, is that the portion allocated to cash should be in a sum certain in order to avoid uncertainty concerning the amount and timing of the cash distribution, to avoid unnecessary administration expenses and to decrease the counts for conflict.

Now, as I think you all can see, I also am fairly intent on resolving the receivership issues today because I would like to have some understanding of the extent to which the contribution of the receivership to the settlement fund will have in covering the expenses of the administration of the settlement.

Now, let's turn to the main reason we're here today, which is to determine whether the proposed settlement is

fair, reasonable and adequate, and it seems to me that we should first hear from Ms. Orkin and then perhaps we'll give Mr. Madden a chance to say whatever he wants, and then we'll let both sides say whatever they would like with respect to the settlement.

Yes.

MR. COOPER: Your Honor, my name is John Cooper.

I believe that there's one item I'd like to correct [44] for the record, and that is I thought that I heard the Court say that the notice was mailed on February 21st. I believe that it was mailed on February 14th.

MR. GOTEINER: That's correct, Your Honor.

THE COURT: Okay. Fine. Thank you.

Okay. So, Ms. Orkin, do you wish to come forward and say anything other than what's contained in your written objections?

MS. ORKIN: I do object to the original plan of allocation, although I do understand from my own experience with class action litigations that 20 percent is not an unreasonable sum to obtain back from a class action.

I would also like to see the filing deadline in this case extended because of the fact that so many of the addresses were outdated. This case is anywhere between eight and 11 years old as far as the addresses are concerned, and you've

had more than 7,000 returned, as you reported, and many of those people are only just now getting their claims. I don't think there's sufficient time for them to both request their monthly statements, get them back, then complete a claim form.

This is income tax time. People are filing their tax returns for April 15th. I do not think it would be unreasonable to extend the filing deadline and give people an additional opportunity to file claim forms.

THE COURT: Okay. Anything else?

[45] MS. ORKIN: It's just my contention. I would like to see as much of this settlement go to all of the members of the class and nothing back to the defendants.

I know that this is a reversionary settlement, but I would like to see as much of this money go to all of the plaintiffs.

Thank you.

THE COURT: Okay. Thanks.

And now, Mr. Madden, what do you want to tell us?

MR. MADDEN: I'll be very brief, and I don't have any objection to the settlement. I just don't know where I stand, if at all, in that settlement class.

Let's see. Brief background.

THE COURT: Sure.

MR. MADDEN: Ten years ago I opened an account with MultiVest, lost $3,000 due to what I believe was fraud and negligence, et cetera.

And a year before this class action was filed, I filed a notice that I intended to file an action against MultiVest, which I did do. I filed a complaint with the CFTC, and I was approached by MultiVest shortly after that via this letter, which you have a copy of, stating that they wish to settle for the amount of $1,900, which I agreed to and accepted and signed, and this letter and accompanying document was signed by officers of James McTevia and Associates on behalf of [46] MultiVest, and subsequently received nothing and was told after I called them that they would not be honoring their letter.

So, basically what I'm wondering is if —

THE COURT: Did they give you any explanation as to why they weren't going to honor the letter?

MR. MADDEN: No.

THE COURT: Okay. So, how did the release end up going back to the receiver? You signed the release and sent it back anticipating you would get the $1,900?

MR. MADDEN: That's right.

THE COURT: Is that what happened?

MR. MADDEN: They said after you return the signed originals of the enclosed documents to me — this is James Robash of McTevia and Associates — I will send you MultiVest Options' check in the amount of $1,900. After I send you the check, I will file the notice of satisfaction with the CFTC.

So I sent —

THE COURT: And, again, what did they tell you as to why they weren't sending you your $1900?

MR. MADDEN: This was so many years ago, I don't exactly remember. But I think they just basically said we're not going to honor the agreement.

THE COURT: As you see, the receiver is here today. So, I think when the receiver comes back into the room, at some appropriate time we'll try to take it up with the receiver and [47] try and understand what happened here.

MR. MADDEN: That will be good.

Obviously, I'm ignorant of all the legal complexities of all this, but I just learned from statements made a couple seconds ago that may or may not exclude me from the class. I don't know if that's good or bad for me. And I also knew nothing about this class action suit until a couple weeks ago when I read about it in the paper.

THE COURT: So you saw the notice in the paper.

MR. MADDEN: That's right. Actually it wasn't the notice. Since I live in Boynton Beach it was just a local news item because it's a company, or was.

Also, if I am in the class, if there's a hierarchy within the class and if this moves me higher or lower, close to the —

THE COURT: There are no priorities among the class members. Everybody's the same.

MR. MADDEN: Okay.

And basically, it would be really nice to know why something that I was able to accomplish, you know, seven years ago without paying lawyer's fees and all the other receiver's fees, now, if I do receive anything from this, I would have to pay all that, you know, additional monies on top of that; in other words, that comes out of the settlement, my part of the settlement.

[48] That's about all I have to say.

THE COURT: All right. Thank you.

MR. MADDEN: Thank you.

THE COURT: So who from the plaintiffs is going to speak concerning the fairness, adequacy and reasonableness of the settlement and perhaps address, hopefully address, Ms. Orkin's and Mr. Madden's concerns?

MR. GOTEINER: Your Honor, we have filed documents — Neil Goteiner on behalf of the plaintiffs.

We have filed pleadings, particularly the one on February 21, where we've set forth in some detail why we think the settlement is fair and reasonable, and I don't want to burden the Court with more discussion on that. It is a fair and reasonable settlement.

THE COURT: If you want to rest on your papers, that's okay with me.

Do you want to respond to some of the issues that Ms. Orkin raised?

MR. GOTEINER: Absolutely.

Well, Ms. Orkin raised, I think, three issues in her papers. One has to do with the reversion, and, of course, that was part and parcel of the settlement process and it enabled us to have a bigger settlement pot for those people who do come and claim. So — in fact, I've explained this to Ms. Orkin over the phone some time ago.

[49] So we think this was a fair and reasonable part of the settlement and made a lot of sense because it did create a bigger pot.

With respect to the $50 charge, which Ms. Orkin raised, that was going to be paying for the expenses that the receiver was going to undergo. There has been some issues, as you know, raised in the correspondence about that.

But the $50 was to come out of any award to a particular class member. It would not be paid up front. And at the time that was reasonable, it seemed to us. But there has been, as I say, some correspondence on this point which the Court might want to address after Mr. Buchband gets his letter on file.

The other objection that I recall Ms. Orkin made had to do with the fees. She didn't raise it orally, but, you know, the Court might want to discount a little bit what I have to say on this. We disagree with Ms. Orkin's written challenge to our fee. I did offer Ms. Orkin to send her the materials so she could make a more informed evaluation of that, and asked her not to — asked her to be gentle with us on this point. So, in any event, she declined to take a look at those documents.

THE COURT: Okay. What do you think about Ms. Orkin's comments concerning whether or not the bar date for filing claims should be pushed back?

[50] MR. GOTEINER: I was going to address that as well.

We agree. Obviously, plaintiffs think it should be pushed back. I should report to you that Mr. Buchband told me that when he was looking at the success rate, he was coming up with a 93 percent success rate on identifying these addresses.

Curiously, by pure serendipity, Ms. Orkin told us prior to the hearing that in fact she works with the Garden City Group and she has some knowledge of this as well, and they are doing a good job now of finding these addresses.

Appendix D

The Court should also know on this score that Mr. Buchband further agreed that, to the extent these people aren't located, that he's going to go the next route, which is a $16, $15 charge, which is paid only if you get a hit, that is, only if you find the address.

So we think these people should get an additional time to file a claim.

THE COURT: How far back do you think the bar date should be pushed?

MR. GOTEINER: Well, it would seem fair to me that the people who are receiving the notices now should get the same amount of time to file their claims with the account statements as the rest of the class got.

THE COURT: Well, I think we need ultimately a cutoff date. I mean, I don't think it can be a fluid date. I think the date has to be fixed.

[51] MR. GOTEINER: Well, that's fine.

THE COURT: So, what do you suggest? May 15th?

MR. GOTEINER: Subject to Ms. Orkin agreeing, of course, May 15 would seem to be a fair enough date.

THE COURT: Okay. Anything else you want to say?

MR: GOTEINER: No.

THE COURT: Okay. Fine.

Okay. What do the defendants wish to say?

MR. DODYK: If Your Honor please, I only have one comment to make, and that is with respect to what Ms. Orkin states with respect to the current mailing.

And I would simply note for Your Honor that this is a problem which arises customarily in the administration of class actions, and the solution which is normally adopted by the courts is not to postpone the date by which the claims must be submitted, because typically, I think once the claims come in, then the parties simply stipulate that certain late claims, in occasions in which the late mailing is caused by some problem in the administrative process, such as, for example, in this case the decision to use the alternative source for the obtaining of the addresses, is accepted by both parties as a reason why with respect to those late-filed claims they will still be admitted.

So I would encourage Your Honor simply to see what happens, and I would be encouraged to think —

[52] THE COURT: Well, you know, in most cases I would be willing to do that. But in this case I'm not.

Is there an agreement that late-filed claims filed up through May 31st will be recognized?

MR. DODYK: Your Honor, I can't state that at this point. But I can certainly say that defendants would consent

to any mailing — any claim which came in late in which the lateness was due to some administrative problem, and I would hope that we would be able to resolve those without any further litigation. I can't —

THE COURT: Mr. Dodyk, I mean, really at this point I think you must understand that there is very little hope of resolving anything in this case without additional litigation.

MR. DODYK: I don't believe that's true, Your Honor. I really don't believe that's true.

THE COURT: I see. Well, what do you think that the impediments are to my just pushing the bar date back?

MR. DODYK: I'm not sure that's possible. I've never seen a case in which that's been done.

THE COURT: Okay.

MR. DODYK: And the bar date is a part of the stipulation; and while the Court has powers, obviously, procedurally over —

THE COURT: I'm not sure. I'm trying to recall whether the bar date was specifically part of the stipulation [53] or whether it was contained in the order.

MR. DODYK: The stipulation says that the bar date is 60 days after the mailing date, and then we put in the order April 15 because it was 60 days after the February 14th mailing date.

THE COURT: Well, actually I think that's sufficiently flexible to deal with the problem. Sixty days after the mailing date, whatever the mailing date might be.

MR. DODYK: Your Honor, that might be an appropriate solution with respect to this class of claimants. I'm not contesting that. All I Your Honor to do is, rather than attempting to resolve it in this fashion, why don't we what happens, because that's the way it normally works out.

THE COURT: Well, because seeing what happens in this case doesn't work out very well.

MR. DODYK: Well, Your Honor —

THE COURT: Okay. So, if your representation to me is that that's the language in the Settlement Agreement, then I think that that pretty well does it. Sixty days from the date of mailing.

MR. GOTEINER: Your Honor, I would just add to it that I think what would be appropriate is for Mr. Buchband — we'll get a new notice for those people who get late notices because they have to be told that, because right now it says April 15th. So those people — Mr. Buchband knows exactly who [54] those are; that there will have to be another notice sent to those people extending that date.

THE COURT: Well, okay. So you all are in favor of waiting and seeing what happens also.

MR. WISOFF: No, Your Honor.

Just to clarify it, the notices that Mr. Buchband is mailing out is the court-approved form of notice which has the April 15th date.

THE COURT: Right.

MR. WISOFF: We don't want people who have received this and it's after April 15th to refrain from filing because of that. So, what we suggest is that there be an amendment included in the remailed notices to let them know they have 60 days from the date of mailing, so that they won't be discouraged from filing a claim during that 60-day period.

THE COURT: So, what are you proposing? Let's be concrete here. Are you proposing that Mr. Buchband simply inclose some kind of brief statement?

MR. GOTEINER: Some of them have already been sent out, Your Honor. So, with respect to some that have already gone out, there's going to have to be a little one-page document that says the Court has extended your time to answer it until this date. All right.

And with respect to the ones that are going out now or haven't gone out yet, something can be included within that [55] notice that clarifies it.

THE COURT: Okay. Well, I see the defendants thumbing madly through the settlement stipulation trying to see what is provided.

MR. DODYK: Your Honor, the research isn't providing any change from what I stated originally. I again would

encourage the Court to think in terms of seeing what happens when it comes in. I understand Your Honor's view on that, but that would be my recommendation.

THE COURT: Okay. Well, let me just say this in the hope of avoiding further litigation on the point, which is that if the agreement provides 60 days from the date of mailing, then Mr. Buchband needs to keep records as to when the mailings are occurring. Let's start there.

If there is a need for Mr. Buchband to notify the people who received the notice late — as I understand it, there have been two mailings so far, is that right?

MR. GOTEINER: Your Honor, there could have been more than two. What's happening is I instructed — well, in fact, Mr. Dodyk didn't oppose it — I told Mr. Buchband to get those notices out as soon as he got the addresses.

THE COURT: Yes, but —

MR. GOTEINER: So there could have been a rolling —

THE COURT: — the affidavit I received from the Garden City Group on March 27th conveys to me that there have [56] been two mailings. At least that's the way I understand it.

MR. GOTEINER: I think he means, Your Honor — I can't speak for the man — but what he told me was that it is ongoing. As he gets the batch of the addresses back from

Mr. Miller at this credit bureau, he sends out additional notices.

We do know that the first mailing was on February 14th. That's what we do know.

THE COURT: And do you know when the second mailing was?

MR. GOTEINER: Ms. Orkin, I understand, can confirm for the Court that what I've told you is correct.

THE COURT: But Ms. Orkin, I take it, doesn't have the dates of the mailings.

MS. ORKIN: No, I don't have that on me. But it is on a rolling basis. As they come in, everything will go out.

THE COURT: Okay.

Well, it seems to me that as to the people who were not — whose packets were returned, if Mr. Buchband needs to send a notice explaining to people that they have 60 days from the date of mailing, then I think that that is certainly a reasonable thing for him to do so the people know that they have some additional time in which to make their claims.

And that's really, I think, all I have to say on it. I say it by way of guidance in the hopes that we can avoid [57] further litigation on this subject.

Yes, Mr. Newman.

MR. NEWMAN: Is the Court so ordering those so that we can represent that to Mr. Buchband?

THE COURT: Yes, I am ordering that.

MR. NEWMAN: Thank you.

THE COURT: Okay. Now, I would like to know — I would like some kind of report or something filed with me when the mailing has been concluded, so I know. Okay?

MR. GOTEINER: Yes, Your Honor. I think Mr. Buchband will submit that to the Court.

THE COURT: Okay. All right.

So, I did review what the plaintiffs provided with respect to their position on the fairness and adequacy and reasonableness of the proposed settlement. I am generally in agreement with their analysis of the situation. I do want to make a few additional observations or amplify some of the observations that the plaintiffs' lawyers have already made.

First of all, I believe that the plaintiffs have applied the correct legal analysis to the issue of whether or not the settlement is fair, adequate or reasonable by assessing the proposed settlement in terms of its relationship to investor losses, in relationship to the difficulties which were incurrent in the case, in relationship to the complexity, duration and expense of the litigation, in relation to the [58] substance and amount of the opposition to the settlement, in relationship

to the stage of the proceedings at which the settlement was achieved, and in relation to the plan of allocation.

Now, more specifically, with respect to each of those factors, I want to make the following observations:

In relationship to the amount of investor losses, the settlement fund consists of $10 million in cash plus approximately $185,000 to be transferred from the CFTC receivership and $30 million in the fully secured master promissory note. The master promissory notice bears interest at 5.5 percent a year and will mature in 10 years, but at the option of the holders of the individual promissory notes that will be issued to the class members with approved claims, the class members will be able, if they wish, to call their notes at the expiration of five years.

Notwithstanding that a significant portion of the class members' recovery will be deferred, I am convinced that the settlement represents a substantial recovery in the peculiar circumstances of this case and in comparison to other class actions alleging fraud in connection with investments such as securities. For reasons which may or may not be touched upon in the discussion today, I concede that securities fraud class actions are not the perfect analog to this case but, nonetheless, are the best comparators available for [59] assessing the reasonableness of the settlement in comparison to other cases.

To put the significance of the recovery in numerical terms, $40 million represents approximately one-third of the investor losses of approximately $120 million, and even

allowing for the delay in payment by factoring in prejudgment interest, the $40 million fund would represent about a 20 percent recovery.

The NERA study, which is in the court file and attached to the Senderowitz affidavit submitted by class counsel, analyze securities class action settlements from 1991 to mid-1996 and reach the conclusion that for that period the average settlement as a percentage of investor losses was 9.13 percent; that the median settlement as a percentage of investor losses was 5.89 percent.

Further, in cases where the settlement amount exceeded $10 million, as in this case, the average and median settlement value as a percentage of damages for that period was 11.1 percent and 6.6 percent respectively.

The defendants have previously indicated that they are generally in agreement with these conclusions, and Mr. Dodyk supplied the Court with his own informal list of results in class actions in which he or his firm had defended, and those results were not any — the results in those cases were certainly not any better than what was reflected in the [60] NERA study.

So, I do believe that the recovery in the case represents a substantial recovery in relationship to investor losses.

Now, in relationship to the difficulties that were inherent in the case, another factor, I think we could all go on at length about the difficulties involved in the case. Suffice it to say for these purposes that, as everyone has acknowledged, the

legal theories were novel, complex and difficult. In fact, the theories were so novel and posed such substantial questions of both fairness and public policy that I had agreed that in the event of a plaintiffs' verdict I would authorize the defendants to take an interlocutory appeal before proceeding with the case further, let alone to judgment, because there were additional proceedings that were necessary in order to determine whether the plaintiffs were entitled to anything at all even after this trial.

Because of the complexity and the novelty of the issues, and because the appeal would necessarily have required the Eleventh Circuit to certify a question to the Florida Supreme Court on an important issue of Florida law, I anticipated — and I think the plaintiffs agree with this — three to four years to conclude the appellate proceedings stemming from the trial and then possibly additional time, if the plaintiffs prevailed on appeal, and possibly another [61] appeal, to resolve the remaining issues in the case and enter a judgment.

The other aspect that I want to highlight — but, of course, this is by no means an exhaustive discussion of how difficult the case was — is that the defense was exceedingly well-funded. It was numerous, tenacious and contested every issue. During the four years when I presided over the case the defense, to my knowledge, was represented by several law firms, some of which are among the most prestigious in the country. To name only the ones of which I am aware — because I suspect there were even more — we have Cravath, Swaine & Moore; we have King & Spaulding out of Atlanta; we have Honigman Miller out of Detroit; Pollack & Kaminsky from New York; and the local firms of Valdes-Fauli, Greenberg Traurig, and Homer and Bonner.

Appendix D

The defense was able to throw massive manpower into this case. I don't doubt that from time to time there may have been as many as 30 lawyers for the defense working on the case at any one point in time.

The defense lawyers were aggressive to the point that the plaintiffs frequently questioned their tactics, and both sides were so contentious and the issues in the case so massive that a Special Master had to be appointed to deal with the infinite number of issues that would arise on virtually a daily basis.

[62] It should also be noted that the case was made more difficult by reason of the fact that there was no insurance from which a recovery could be obtained. The sole source of any significant recovery was Mr. Grosfeld's net worth, and this made the case more personal, more contentious and more difficult to settle, as well as more uncertain of result because collection of a judgment became potentially a problem.

Now, in relationship to the complexity, duration and expense of the litigation, apart from what has already been said on this account in the papers that have been filed and what I have already said today, the large numbers of lawyers staffing the defense and their ability to generate controversy after controversy made any recovery uncertain, as well as did the unsettled state of the law.

Further, it should be noted that the case began in 1990 in federal court in California, and it was California counsel that accepted representation of Mr. Waters and Ms.

Bartholomew, and they accepted that representation on a contingent fee basis.

Then the case was transferred to Florida, and unlike what normally happens in securities fraud cases that are viable and well-founded, someone else comes forward with some other client and seeks the right to be lead counsel. Nothing like that happened here.

So, for over six years a relatively small group of [63] California lawyers had been battling a fairly large group of defense lawyers in a tenacious effort to bring this case to a conclusion in Miami, Florida. The logistical difficulties, not to speak of the expense and inconvenience, had to be extreme.

In relation to the substance and amount of opposition to the settlement, that factor is not — taking nothing away from Ms. Orkin, that factor doesn't have a lot of significance since out of even the 13,000 people who apparently have received the notice, she is the only person here objecting to the settlement, although her comments are, I think, well taken.

MS. ORKIN: I have no objection to them getting one-third of the settlement at this point.

THE COURT: Okay.

MS. ORKIN: I understand the complexity of it, and I think initially I was just angry at the reversionary clause and wanted to punish them for it. But I do understand that they've been working many, many years on this case and I have no objection to that. I know that one-third is the norm.

Appendix D

THE COURT: Okay. Thanks, Ms. Orkin.

Did you get that, Bill?

THE REPORTER: Yes.

THE COURT: Okay.

Now, in relationship to the stage of the proceeding at which the settlement was achieved, as I understand it, the [64] settlement was arrived at after more than six years of pretrial discovery and other proceedings, five months of court proceedings consisting of the final pretrial conference and the trial, and not until after all of the evidence had been presented to the jury and the jury instructions and the form of verdict had finally been determined.

There certainly can be no question that both sides were fully aware of the strengths and weaknesses in their legal and factual positions and the toll being taken by the litigation generally, as well as what would be required to conclude the litigation when they agreed to the settlement.

In relationship to the plan of allocation, the stipulation of settlement provides that each class member will recover from the net settlement fund in the same proportion that his or her losses bore to total customer losses. Therefore, the claim of any class member will not reduce or increase the recovery of any other class member except to the extent that the Court orders that bonuses be paid to the class representatives, Mr. Waters and Ms. Bartholomew, which is a subject that we still need to discuss today.

And finally, I think it should be noted that the settlement plainly is not collusive in any respect. Both sides have represented that the settlement negotiations spanned several months and that a settlement was reached only after exhaustive review, rejection and reconsideration of numerous [65] earlier proposals. In fact, the contentious ugly quality of this litigation has continued to be apparent and a problem since the Court's preliminary approval of the settlement, notwithstanding that the settlement represents a joint proposal with the alleged support of both sides.

So, in sum, the Court finds that the settlement of $40 million on the terms set forth in the stipulation, even after having taken into consideration its most undesirable aspects, specifically the substantial deferral of compensation to the class members, strikes a fair, adequate and reasonable balance among the losses suffered by the class members, the length of time the class members have had to wait for any recovery, and the complexities and difficulties that have been inherent in and peculiar to this case.

So, the Court is approving the settlement as fair, adequate and reasonable.

Now, the next matter I would like to take up is the bonus issue as to Mr. Waters and Ms. Bartholomew. Class counsel are requesting $10,000 bonuses for each of the class representatives. Class counsel has represented that Mr. Waters and Ms. Bartholomew followed the litigation for nearly seven years and have pointed out that, unlike other class members, they were required to submit to lengthy depositions, to respond to additional discovery and to produce their personal financial records.

[66] Class counsel have also opined that the bonuses represent only a, quote, minor, unquote, portion of the settlement, but to my knowledge have not stated how any such bonus should be allocated between cash and a deferred obligation, or whether their position is that it should be paid entirely in cash.

So at this time the Court will hear the parties, beginning with class counsel, on the issue of the bonuses to the class representatives.

MR. GOTEINER: Your Honor, if we omitted to specify the allocation, it should have been in the same allocation as the rest of the class members, 25 percent cash, 75 percent deferred obligations, promissory notes rather.

THE COURT: Okay. And is there anybody who — do you want to say anything else in support of the request for bonuses?

MR. GOTEINER: Well, we have stated in our papers, Your Honor pointed it out — I would go into more, because there are a couple of class members here who might have certain feelings about it. It would really be to address their concerns.

But all I can say is that these people did follow — Ms. Bartholomew and Mr. Waters, did follow the litigation. It was a lot of emotional drain and strain on them, and in our opinion they are well entitled to it.

[67] THE COURT: Does the defense want to be heard on that issue?

MR. DODYK: The defense takes no position on the question, Your Honor.

THE COURT: I think that under the circumstances the $10,000 bonuses for each of them is reasonable, and that it should be allocated as follows: I think that they should receive $2,500 in cash out of the $10 million cash portion of the settlement and the balance as a deferred obligation.

Okay. So, I am trying to get away from this — I'm trying to make a point here, which is I'm trying to get away from this percentage allocation because I doubt very much that's the way I'm going to be going on the attorneys' fees today.

MR. GOTEINER: Your Honor, just to be clear. With respect to the Court's order on the class representatives, it's each, each of them gets the $25,000 plus $7,500.

THE COURT: Yes.

MR. GOTEINER: $2,500, I'm sorry, plus $7,500.

THE COURT: Yes.

Now, when the receiver was out of the room, a new issue arose with respect to the receiver. Maybe someone could take the receiver aside with Mr. Madden over here —

MR. NEWMAN: I'd be happy to step outside and do that for a second, explain to them what happened while they were out [68] and then they could come back in. Would that be helpful?

THE COURT: Yeah. I was going to go on now to the attorneys' fees issue. But maybe what I could do is take a five-minute recess before we do that, and that will give you a chance to talk to them about this other issue.

MR. NEWMAN: That would be very helpful. Let me just take them outside and talk to them.

THE COURT: Okay. Let's take a five-minute recess.

(Recessed at 11:30 a.m.)

(Resumed at 11:46 a.m.)

THE COURT: Okay. Let us resume here.

Did the receiver's counsel and the receiver have an opportunity to speak to Mr. Madden?

MR. TRAISON: We did, Your Honor. And we'll address two issues now, Mr. Madden's issue being one and then the issue originally posed by the Court regarding the storage cost so that you'll have the proper figures.

THE COURT: Right.

MR. TRAISON: What I'd like to do is simply lay out the facts as we've determined them.

It appears that sometime ago, I believe in or about 1990, the receiver was in the process of making settlements with some claimants and in fact did complete some of those settlements and actually also paid those claimants.

There were, however, three or four, perhaps as many [69] as six, with whom a proposed settlement had been made, but prior to the time that the Settlement Agreement could be completed — and certainly that would include the payment of money — the CFTC notified the receiver that it objected to any more settlements being made because it felt that there would be virtually dozens if not hundreds of these coming and the estate would be depleted roughly, soon.

The receiver determined that that was probably correct, but in any event, honoring the request of the CFTC, stopped the process of the settlements, and in the case of Mr. Madden, did not make that payment.

THE COURT: So the receiver's position would be that the release that Mr. Madden delivered was not delivered in exchange for any consideration and is void.

MR. TRAISON: I must say to the Court that my first reaction when I began to hear these facts was that possibly Mr. Madden had relied upon an agreement with the receiver to his detriment, thus compelling us to honor it because of his reliance; and, number two, because other parties similarly situated did not appear today to raise the issue.

But I must advise the Court that Mr. Madden has advised the receiver — and, of course, Mr. Madden did not have counsel here either, so that's a little awkward — that he did know that it would not be honored, the agreement. So that makes me question the reliance issue and —

[70] THE COURT: Well, no. My question to you is do you take the position that he executed a release or not?

MR. TRAISON: He executed a release.

THE COURT: But do you take the position that the release is valid, that it was given in exchange for any kind of consideration?

What did he receive for his release, Mr. Traison?

MR. TRAISON: He received nothing at all for his requite. Quite the opposite, he probably relied —

THE COURT: And he gave the release in anticipation that he would receive $1,900.

MR. TRAISON: That is correct.

THE COURT: So you don't take the position that the release is effective, do you?

MR. TRAISON: No, not that it's effective, no.

THE COURT: Okay.

MR. TRAISON: The question we were focused in on and would like the Court to make the decision on is whether the receiver would have permission to pay the $1,900 to Mr. Madden from the receivership.

THE COURT: Well, I don't know. It's sort of a — the fact is that Mr. Madden would benefit over and above the other members of the class if the Court were to agree to that.

It seems to me that Mr. Madden is a member of the class, and so he should assert his claim like the other class [71] members and receive his proportionate share of the recovery. I don't see that he relied to his detriment and I don't see that the release is valid.

Now, this raises an issue in my mind, because I would like to avoid litigation in the future to the extent possible, of other individuals who sent releases to the receiver who we may have believed were therefore not part of the class.

Now, as I recall, the only people that I ruled out of the class were the people that released MOI and its affiliated entities basically. I haven't gone back to look at that ruling in a long time, but I think that that's it. So, it's the people who had the kind of language in their release that Mr. Madden had that would be of concern to me.

Now, I don't recall that when we looked at who was in and who was out of the class, at least on a preliminary basis, I don't recall seeing any other releases that were executed by the receiver. Now, I don't know whether any of the defense lawyers who are present are in a position to speak to that, because I think this is more Mr. Wasinger's bailiwick.

MR. KAMINSKY: I'm afraid that's correct, Your Honor. We're not aware of that ourselves. We don't know what the situation was one way or the other.

THE COURT: Well, what I would ask the receiver to do is to supply me and the lawyers for both sides with a list of anybody — of the names and addresses of anyone and

supporting [72] documentation relating to any person who delivered a release who didn't get anything for the release. Okay?

MR. TRAISON: That should be fairly easy to do given the small number involved.

MR. McTEVIA: To the contrary, I don't think we'd be able to do that because the release —

MR. TRAISON: We're taking about four or five.

MR. McTEVIA: No, we're not. We're talking about — the release issues falls into three separate categories, your Honor. There were a number of checks that were written from the receivership estate for people who got the releases in.

This is an ongoing process. We're in the process of negotiating with them, and there were releases that were sent out and there were a number of releases that were returned to the receivership. And this happened so long ago, I don't know if I would be able to reconstruct the — that's the question I had in my mind out in the anteroom here talking to Mr. Madden.

How in the world am I ever going to be able to reconstruct who we sent releases to, who sent the releases back to us where they were in our possession?

THE COURT: Well, let me ask you this. Do you have a list of the people that you sent money to?

MR. McTEVIA: Yes. Of course, they would have been sent money out of the receivership account, that's correct. It would have been in 1990.

[73] THE COURT: How about this. How about you give us all a list of the customers who received money from the receiver?

MR. McTEVIA: Okay. I can do that. I can reconstruct that through the checkbook.

THE COURT: And then at least when people submit — if there are other people who come forward, like Mr. Madden, who claim that they had some kind of an agreement with the receiver that was not consummated, we can at least go to the list to see whether or not they received any money from the receiver, and then we can take it from there.

MR. McTEVIA: But for the sake of writing a check and putting it in the mail, that agreement with him would have been consummated, and my discussion with counsel and Mr. Madden out there was all of these other people, whoever they are, were all given notice of this, and Mr. Madden was the only one to show up with his release and says, wait a minute, I never got a check and you told me I wasn't going to get one but you never told me why. So, you know —

THE COURT: Do we even know to a certainty that Mr. Madden didn't get paid? I mean, Mr. Madden says he didn't get paid. Does that jibe with your records, do you know?

MR. McTEVIA: Well, when we get the list of the people who got paid, as Your Honor has suggested, we'll find out.

[74] THE COURT: Okay.

Well, my position is Mr. Madden's part of the class. Apparently that was the intent at the time. The intent at the time was that when the receiver stopped paying with respect to these disputes was that if people had claims, they were either going to have to assert them directly against the company or they were going to have to be part of the class, the company and the related parties, or be part of the class. Is that right?

MR. TRAISON: Yes. It was never our intention to assert that the release was effective.

THE COURT: Okay. Fine. What about this other issue concerning the —

MR. TRAISON: I'll ask the receiver to address that.

THE COURT: Mr. Madden, so what you need to do is you need to submit a claim, and if you -- I don't know. I doubt that anybody here has any claim forms. But you need to contact the Garden City Group and get the claim forms.

MR. MADDEN: I have the claim forms, your Honor.

THE COURT: You do have the claim forms.

MR. MADDEN: Let me just say, if I had been aware of the opportunity to exclude myself from the class a couple of years ago —

THE REPORTER: Excuse me. I'm not hearing you. You neat to get near a microphone, please.

[75] THE COURT: The court reporter needs to be able to take down everything that's said.

MR. MADDEN: If I was aware of the opportunity to exclude myself from the class, I think it was two or three years ago, I would have pursued that at least based on this. But I never knew anything about this action or the exclusion opportunity until long after that date passed.

THE COURT: Okay. I appreciate that. But I long ago determined that the notice that was given to the class members of the action was the most reasonable and practical under the circumstances, and the time has long expired to challenge that.

MR. MADDEN: Can I also say that I spent hundreds and hundreds of hours researching this and bringing this together, and that's what I think, based on the merits of what I had presented, the receiver agreed to pay that money, and I complied with what he — they asked me to do and never got anything in return for it.

THE COURT: Okay. I appreciate what you're saying, but at this point I don't see that there's really any — I think it would be highly inappropriate to treat you any differently than any other member of the class.

MR. MADDEN: I am sorry you feel that way, Your Honor.

THE COURT: Okay. What about this other issue concerning the costs?

[76] MR. McTEVIA: I've contacted my office and we made some telephone calls.

To transport all of the records from Miami back to the Fort Lauderdale storage area would cost approximately $7,000, which is approximately what the cost was to transfer them there in the first place.

To pay for the storage areas that are necessary to store all of the books and records in the Fort Lauderdale area for a period of 12 months would run $800 a month at Shurgard Storage for approximately $9,600.

To hire a shredder — and the shredding company would do it on the premises, Your Honor; there would be no more moving of the books and records; a shredder would come to wherever the books and records were and the documents would be shredded after a period of one year — would cost $15,000.

So, for approximately $5,000 more, these books and records can be maintained in estate for one year, after which they can be destroyed, and my office is prepared to coordinate all the efforts.

THE COURT: What about, I thought you were going to store them in Fort Lauderdale for 30 days in some other location?

MR. McTEVIA: The transport of the books and records to Shurgard allows for the books and records to be examined at Shurgard Storage.

[77] THE COURT: Fine. Okay. And, of course, we're only talking about a year as hopefully a very outside date. Hopefully they would be able to give you notice sooner than a year and save us that $5,000 or more.

MR. McTEVIA: We will control access to the facility for 30 days as you've recommended, but after that I suspect that any party in interest who wants access can simply contact us for a key and we can make arrangements.

THE COURT: Well, does anyone see a problem with that?

I'm really not very satisfied with that. My position is — actually this is my position. My position is anybody who wants to see the documents for the next 30 days can go look at the documents for the next 30 days. But after that 30 days those documents stay under lock and key.

MR. McTEVIA: I understand, Your Honor.

THE COURT: Okay. So the total — so, let me make sure — my arithmetic must be really lousy. It was $7,000 plus $9,600.

MR. McTEVIA: That's correct.

THE COURT: Plus $15,000, right?

MR. McTEVIA: That's correct.

THE COURT: So the total is $31,600?

MR. McTEVIA: That's correct.

THE COURT: As opposed to the $33,000 that Bekins — [78] no, they were $27,000.

MR. McTEVIA: $27,000, your Honor.

THE COURT: Okay. Fine. So I think that that's acceptable, with the understanding that if the parties can notify you that the appellate time has expired sooner than the expiration of a year, then at that point the documents should be destroyed.

MR. McTEVIA: And the remaining funds should be turned over to the disbursing officer.

THE COURT: Right. Exactly.

So, now, Mr. Traison, I'm hoping you're going to draw the order here on the receiver's fees and expenses and your attorneys' fees and expenses. Do you need for me to recap any of this?

MR. TRAISON: I don't think we need to trouble you with that now. Perhaps I'll have those pages from the transcript requested.

So I take it from your comment that that portion will be separate from the order directing how the receiver will

dispose of the documents, and we'll have two orders there, one for fees and expenses and one on the disposition issues.

THE COURT: That would be fine. I don't have a problem with that.

MR. TRAISON: Now, would the Court like us to prepare the disposition order as well —

[79] THE COURT: Yes.

MR. TRAISON: — with the release language, et cetera?

THE COURT: Yes.

MR. TRAISON: Thank you, Your Honor. We will do that.

THE COURT: And at what point — so, let's see. What you'll end up doing is you will end up turning over to — let's figure out how much you'll be turning over now to the settlement fund. Let's see. The receiver's fee, $38,000 minus $4,463.

MR. McTEVIA: I have it all figured out, your Honor.

THE COURT: Okay.

MR. McTEVIA: After deducting what was disallowed and allowing what I am petitioning for, the receiver's fees and expenses would be $37,080.22; and counsel for the receiver's fees, yours would be $10,000; and the Shurgard would be $31,600.

THE COURT: Okay. So the total is?

MR. McTEVIA: $45,380.22 is the deduction from $215,125, plus the receivables of $7,455 which I've received already this morning, and $3195 which I've yet to receive from plaintiff.

MR. TRAISON: Just for the record, I think the order will also need to contemplate the return by receiver's counsel [80] of the $1,440 that was disallowed to the receivership estate.

THE COURT: That's right.

MR. McTEVIA: So we have $225,775 in assets. How much are you going to return to the estate?

MR. McTEVIA: $1,440 is going to be returned. So the net asset is $227,105 minus $45,380.22.

THE COURT: Okay.

MR. TRAISON: Okay?

THE COURT: Okay. So, anyhow, you'll break this all down, hopefully, in the orders and we'll all have a chance to review them and make sure they're okay.

How soon will you be able to get the orders to me?

MR. TRAISON: Well, we should be able to send around drafts within a matter of days. I would feel comfortable if I

had those pages from the transcript. I don't know how long that will take to get that.

THE COURT: Bill, can you provide him with the transcripts, just the portions relating to the receivership, by Friday?

THE REPORTER: Yes.

THE COURT: So we'll look for your order by the following Friday, which is, I think, April 11th.

MR. McTEVIA: It looks like $181,724.78 is the amount that will be turned over to the disbursing officer.

[81] MR. TRAISON: We'll get all those figures and we'll circulate a draft.

THE COURT: So it's more or less $181,000.

MR. McTEVIA: That's correct, your Honor.

THE COURT: Thank you very much.

MR. TRAISON: Thank you, Your Honor.

THE COURT: Okay. Now, the next matter is the issue of the attorneys' fees and costs, and again, I want to take a couple of minutes to introduce the issue.

There have been at least two noteworthy developments since I gave my preliminary approval to the settlement with

respect to the issue of attorneys' fees and costs. First, the plaintiffs' counsel has since proposed that their fee and expense award be paid 25 percent out of the cash portion of the settlement fund and 75 percent as a deferred obligation to the settlement class, so that the class members might similarly receive 25 percent of their approved claims from the cash portion of the settlement and 75 percent in the form of individual promissory notes.

That proposal was directly responsive to the dissatisfaction that I had expressed during the last week in January when preliminary approval of the proposed settlement was under consideration, my initial reaction having been that the proposed settlement unfairly placed the inconvenience and uncertainty of the deferred obligation entirely on the members [82] of the class while the lawyers would receive an immediate benefit.

While I don't disagree that the plaintiffs' proposal is a step in the right direction, I'm not sure that the deferred portion of the fees and costs must necessarily be 75 percent as opposed to some lesser percentage or some lesser amount. After all, if they have conferred a substantial benefit on the class under exceptionally difficult circumstances, fairness would seem to dictate that they be differentiated from the passive class members by receiving an amount representing a higher percentage from the cash portion of the settlement fund.

The other noteworthy development is that, notwithstanding that the defendants agreed not to oppose the plaintiffs' fee and expense applications, the defendants'

lawyers have taken the position that the fee, to the extent it is a percentage of the fund, should be based on the actual amount of approved claims and that the determination of the fees and expenses should be deferred until the amount of the approved claims can be ascertained.

They further have estimated, based upon Mr. Dodyk's experience in one other class action, that the actual payout on approved claims, due mainly to the failure of class members to submit claims, would be as low as $3,600,000, and from this estimate they argue that the plaintiffs' counsel should be [83] limited to a fee of 33 percent or more or less this amount, which would represent a loss of, of course, many millions of dollars to the plaintiffs' lawyers.

This position poses a logistical problem for the defendants, apart from the fact that they agreed not to oppose the plaintiffs' attorneys' fees and expense applications; that is, they argued vigorously for preliminary approval of the settlement, and in the course of their arguments asserted that the settlement of $40 million, albeit in cash and notes, represented a substantial and unusually large recovery in a class action such as this. In so arguing, they took no issue at the time with the plaintiffs' lawyers' view that, depending upon whether delay was considered, the recovery represented between 20 percent and 30 percent of the investor losses in this case.

To deal with this problem, Mr. Dodyk notes in his submission that an actual payout of $3,600,000 would still represent about three percent of the claimed total loss of approximately $120 million, and he notes that because he

would like to see the plaintiffs' lawyers — apparently because he would like to see the plaintiffs' lawyers incur substantial losses and see the settlement go through.

Of course, regardless of whether such a settlement would be upheld on appeal, a proposition which I believe is doubtful but in which Mr. Dodyk has a lot of confidence, [84] apparently, I would not have given approval to the settlement if I had believed that its true economic value were only $3,600,000, not after five months of court proceedings and four prior years during which I was the presiding judge over litigation more contentious than I suspect most of my colleagues will ever be exposed to.

Moreover, Mr. Dodyk's "the glass is half full and empty at the same time" argument fails because, in my view, it is contrary to law, specifically Supreme Court precedent. In the Boeing Company versus Van Gemmert, at 100 Supreme Court 745, the Supreme Court held that the District Court had properly awarded attorneys' fees from the total amount of the class action judgment, including the unclaimed portion of the judgment, since each class member had present vested interest in the class recovery and could collect his or her share by submitting a claim, regardless of whether he or she actually did so.

In fact, Mr. Dodyk has provided the Court with no law to support his position that this Court should only look to the amount actually paid to determine plaintiffs' counsel's fees, despite the thousands of class actions which have been successfully concluded in this country. He simply proposes to distinguish the case now before the Court because the

settlement stipulation in this case provides for a reversion to Mr. Grosfeld of all unclaimed funds; whereas, according to [85] Mr. Dodyk, there usually is no difference between the amounts contributed to the settlement fund and the amount disbursed.

But Mr. Dodyk seems to forget that a reversion was part of the settlement in the Boeing case. Also, I do not accept that reversions are unusual because of the prescription in the law against fluid recoveries, i.e., recoveries which can vary up or down depending upon the number of claims asserted.

Finally, Mr. Dodyk's contention fails to account for the public interest that the well-conceived class action advances. If attorneys can only prosecute such cases at a loss, which will be the end result of Mr. Dodyk's approach, no attorney would be willing to undertake these difficult cases.

In short, Mr. Dodyk's position may have public relations appeal, but is entirely contrary to law and to public policy and the Court rejects it.

Turning now to what would be a reasonable fee and expense award in this case, the parties acknowledge that the Eleventh Circuit Court of Appeals decision in Camden One Condominium Association versus Dunkel, at 946 F.2d 768, Eleventh Circuit, 1991, supplies the appropriate method of calculating a fee in a case such as this.

Pursuant to Camden One, quote, "Henceforth in this circuit, attorneys' fees awarded from a common fund shall

be based upon a reasonable percentage of the fund established for the benefit of the class," close quote.

[86] In making this pronouncement, the Court of Appeals noted that analysis in a common fund case focuses not on the plaintiffs' position as prevailing parties but on a showing that the fund conferring a benefit on the class resulted from their efforts. In this context, monetary results achieved predominate over all other criteria.

The court went on to note that the majority of common fund fee awards fall between 20 percent to 30 percent of the fund and that, therefore, many district courts were using 25 percent as a benchmark to be adjusted up or down depending on the circumstances in a particular case.

Now, having said that, dealing only with attorneys' fees and not with costs, is there anything other than what is contained in your papers that you would like to say concerning the attorney's fee? Plaintiffs' counsel.

MR. GOTEINER: No, Your Honor.

THE COURT: And how about the defense?

MR. DODYK: We have nothing to add, Your Honor.

THE COURT: Fine. Then the Court makes the following findings:

The only evidence before the Court from which a benchmark might be selected, as required by Camden One,

is the NERA study of filings and settlements in shareholder class actions.

I would note again, as I did earlier, that securities [87] class actions may be the best comparators available for the purpose of assessing the fee in this case, but there are many dissimilarities between this case and the typical securities class action, making this case much more difficult.

In any event, the NERA study includes the following findings: That the average attorney's fee in securities class actions in the Eleventh Circuit between 1991 and mid-1996 was 29.92 percent of the total settlement, and that the average and median attorneys' fees awards as a percentage of settlement in class actions nationwide that were settled, class actions that were settled nationwide, in the range of $10 million to $49 million was 31.72 percent and 33.33 percent, respectively.

Since this Court sits in the Eleventh Circuit, I have decided to use a benchmark of 30 percent, or $12 million.

The next issue is whether the benchmark should be adjusted up or down based upon the particular factors present in this case. In making that decision the Court again looks to Camden, which instructs me to apply such factors as the factors in Johnson versus Georgia Highway Commission at 488 F.2d 714, Fifth Circuit, 1974, as well as other relevant factors, such as the amount of time required to reach a settlement, whether there are any substantial objections to the settlement or fees, and any nonmonetary benefits conferred upon the class by the settlement and the economics involved in prosecuting a class action.

[88] Applying the Johnson and related factors, the Court finds as follows:

As to the time and labor required: Plaintiffs' counsel has supplied the Court with a dearth of information concerning their actual time and labor required to prosecute the case. While I would have preferred more information and much more detail, I am sufficiently acquainted with this case as well as other class actions in this community, both as a practicing lawyer and as a judge, to know to a certainty that the time and labor required to prosecute this case far exceeded the average investor class action.

The abnormally high expenditure of time and labor is attributable mainly to two aspects of the case: The novelty and complexity of the issues and the vigorous and unusually aggressive defense. In fact, the demands on the Court's times and the demands which would have been made on the assigned Magistrate Judge were such that, as I noted earlier, it became necessary to appoint a Special Master to oversee the pretrial proceedings in this case. This factor, therefore, militates in favor of an upward adjustment to the benchmark.

With respect to the novelty and difficulty of the issues involved, virtually every issue in the case, from issues of federal preemption in the area of commodities regulation to the applicability of the presumption of reliance, was novel and difficult.

[89] In fact, the defendants took such exception to the Court's resolution of certain of the more difficult legal issues in the case that they took the unusual step of seeking a writ

of mandamus from the Court of Appeals to prevent the trial from proceeding.

Moreover, I was sufficiently uncomfortable with the applicability of the law to the facts in this case that I had made that I had agreed that the defendants could take an interlocutory appeal in the event of a plaintiffs' verdict, provided they could assure me that Mr. Grosfeld would not remove his assets beyond the Court's jurisdiction. This factor militates in favor of an upward adjustment to the benchmark.

The third factor is the skill requisite to perform the legal services properly. For the reasons I've already stated, the case required a higher degree of skill than the average securities class action. This factor militates in favor of an upward adjustment to the benchmark.

The fourth factor is the preclusion of other employment. I have no doubt that the Farella Braun attorneys who were actively and continuously involved in this case were unable to devote any significant time to any other matters, particularly during the five months that they were in Miami for the final pretrial conference and the trial. This factor militates in favor of an upward adjustment to the benchmark.

The customary fee is the fifth factor. The Court has [90] already noted that a customary fee in a securities class action, the type of action most comparable to this in which there is wide experience, would be approximately 30 percent. This factor is neutral with respect to the benchmark.

The sixth factor is whether the fee was fixed or contingent. Plaintiffs' counsel have not supplied me with

their engagement letter with their clients. However, attorneys Goteiner and Lipoff have sworn under oath that the fee arrangements with Mr. Waters and Ms. Bartholomew were contingent, and that the two law firms advanced the very considerable costs incurred. This factor militates in favor of adjusting the benchmark upward due to the substantial risks accepted by plaintiffs' lawyers.

The seventh factor is the time limitations imposed by the client or the circumstances. The clients imposed no time limitations. There were, however, emergencies from time to time that required quick response on the part of the attorneys. This factor is neutral with respect to the benchmark.

The eighth factor is the amount involved and the results obtained. The Court has already explained that the out-of-pocket losses were approximately $120 million. Those losses were fixed in or around 1989, so there has been a significant delay in obtaining compensation for the class. If the delay were taken into account, the out-of-pocket losses [91] including prejudgment interest would be in the neighborhood of $180 million.

Therefore, the available of $40 million, including $10 million in cash and $30 million with interest at 5.5 percent to compensate for those losses, represents a recovery of 30 to 20 percent, depending upon whether the delay is taken into account. As already noted, this represents a substantial recovery for an investment-related class action.

The Court, however, does not consider the recovery extraordinary or spectacular. In real economic terms, an

average class member with a claim of $6,000 will ultimately receive a note or cash and notes of $1,200. At least some portion of the $1,200 will not be payable for at least five years, and then only if the class member demands payment.

The delay and expense involved in this case is not attributable solely to the defendants. For example, for a substantial period of time the plaintiffs together with the defendants demanded to be able to try this case without time limitations, and estimated that the trial would require some eight months, not a very realistic prospect in a busy urban district. Both sides can be faulted for drawing the case out and for failing to cooperate with each other and the Court.

Further, as Mr. Dodyk has pointed out, after seven years the number of class members actually asserting claims will be significant lower than the class membership. I can [92] also anticipate that the number of class members who end up having approved claims, who will actually demand payment on their notes after five years similarly will decrease, so that the actual dollars paid out will be substantially less than $40 million.

In the Court's opinion, the result is good, but the deferral of the payment obligation for five or 10 years at least has the potential for significantly eroding the benefit to the class in favor of Mr. Grosfeld, and the settlement came late at a significant cost to the class. For these reasons the Court sees this factor, which is really the most important factor, as having no impact on the benchmark.

The ninth factor is the experience, reputation and ability of the attorneys. Plaintiffs have established in their dealings

with the Court and through their Senderowitz declaration that they were experienced in commodities litigation and class action litigation, and that they possessed the reputation to serve reputably as lead counsel in a case such as this, and that they have had the ability to prosecute the case with the highest of the degree of skill. The Court perceives this factor as having no effect on the benchmark.

The tenth factor is the undesirability of the case. Unlike in most viable securities fraud class actions, plaintiffs' counsel had no competition for the responsibility of prosecuting this case. As already noted, the case was [93] unusually difficult and became unusually expensive and time-consuming. This factor weighs in favor of enhancing plaintiffs' counsel fee above the benchmark.

And the eleventh factor is the nature and extent of the professional relationship with the client. The lawyers have represented that prior to this case, class counsel had no relationship with the class representatives except that the Raring and Lipoff firm represented Mr. Waters in a dispute with MOI. This factor is, it seems to me, neutral with respect to the benchmark.

As to other possible Camden One factors, the Court would address the time required to reach a settlement. Pursuant to court order, the parties attended mediation in 1994. The mediation lasted for several days, yet no settlement could be negotiated. The Court is under the impression that thereafter very little was pursued in the way of settlement negotiations until the trial began or it became apparent that the case would actually proceed to trial.

Appendix D

The parties have represented that the settlement negotiations were ongoing throughout the trial, and that the agreement was reached only after several proposals and counter-proposals were made, after all of the evidence had been presented to the jury and the jury instructions and form of verdict had been finally decided upon.

In the Court's experience, this was an unusual route [94] for the case to take, it being the case that most investor litigation settles before trial. This factor militates in favor of an upward adjustment to the benchmark.

There were also unique factors in this case. The plaintiffs' attorneys argue, and the Court agrees, that apart from the usual public policy aspect of any class action, that is, the redress of small claims which individually would be difficult, if not impossible, to prosecute, this case served to put the commodities, boiler room and telemarketing industries on notice that under at least some circumstances a class action might be brought to seek compensation for deceptive and high-pressure sales tactics.

So, for the reasons stated, I do believe that class counsel is entitled to a small upward adjustment in the benchmark of 30 percent, and that the appropriate adjustment is to the percentage of the fund requested by class counsel as its fee, that is, 33 and a third percent, or $13,333,333.

Now, this takes me to costs; and these are the observations I would like to make on the cost issue, and I doubt very much that we are going to be able to conclude the matter of costs today.

* * * *

APPENDIX E — EXCERPTS FROM TRANSCRIPT OF STATUS CONFERENCE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED APRIL 25, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 90-6863-Civ-UNGARO-BENAGES

WILLIAM WATERS and LINDA BARTHOLOMEW,

Plaintiffs,

– v –

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, MULTIVEST REAL ESTATE, INC., S.S. MELBOURNE, INC., and THE CYPRESS GROUP, INC.,

Defendants.

Miami, Florida
April 25, 1997
10:42 a.m.

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE URSULA
UNGARO-BENAGES
U.S. DISTRICT JUDGE

* * *

[25] THE COURT: Listen, I fully expect it. But, you know what? It's not worth it to try to figure out what it is. Just got to take it day by day.

MR. GOTEINER: Right. Then the record is closed and on appeal. They'll have their declarations, which are an outrage, regarding settlement discussions, and we haven't responded.

THE COURT: Look, the record is open for you to writing anything you want in writing. But there are no motions in front of me. And, so, I don't intend to — with respect to that, and I don't intend to deal with it.

The settlement is what it is. What went on before seems to me to really have nothing to do with anything.

I will say this, which is this case really taught me a lesson. I really made a decision when I came here that I would do nothing off the record, and the very first — of all the cases to have let my guard down in, I chose in this case to do it.

And, so, we sat in my library. I invited everyone in in good faith to come into my library to discuss the settlement off the record because I had real concerns about it, including concerns about the gross settlement amount, including concerns about the amount of attorneys' fees that would be claimed and the amount of costs; and it was my impression then, and it remains my recollection of my impression, then, that the [26] settlement was advocated vigorously by both sides in an effort to overcome my objections to it; that the

Court had specific concerns about the amount of attorneys' fees contemplated to be claimed; that the NERA study was offered by both sides, although it is the plaintiffs who physically produced it, as authoritative; that it was represented to me that the fee award sought was well within the range of common practice in these types of cases; and because I was concerned about the amount of costs, I asked for an estimate at the time.

An estimate was put on the table by the plaintiffs. It is pretty much in line with what the costs have ended up being, and everyone thought that would be perfectly reasonable. That's what matters to me. What matters to me is what went on in my conference room.

Talk to you on Monday.

(Recessed at 11:43 a.m.)

* * * *

APPENDIX F — SEALED AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DENYING PRELIMINARY INJUNCTION UNDER FRAUDULENT TRANSFER CLAIM DATED JULY 10, 1995, *NUNC PRO TUNC* FOR FEBRUARY 21, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 90-6863-CIV-UNGARO-BENAGES

WILLIAM WATERS AND LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated,

Plaintiffs,

vs.

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, Individually and as Trustee of the Jason Grosfeld Trust, MULTWEST REAL ESTATE, INC., S.S. MELBOURNE, INC. and THE CYPRESS GROUP, INC. et. al.,

Defendants.

SEALED AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING PRELIMINARY INJUNCTION UNDER FRAUDULENT TRANSFER CLAIM

THIS MATTER is before this Court upon Plaintiffs' Emergency Motion for Preliminary Injunction under the Fraudulent Transfer Act and Plaintiffs' Motion for Leave to

Appendix F

Amend Complaint to State Claim for Preliminary Injunction under the Fraudulent Conveyance Statute. Pursuant to the agreement of counsel, a hearing was held as to these matters on February 21, 1995.

These motions arise in the context of a class action pending since 1990, alleging violations of the Commodity and Exchange Act (CEA) §§ 4c(b), 13a and 22; the Rules and Regulations of the CFTC, §§ 32.9 and 33.10; the Florida "boiler room" statute, Fla. Slat. § 517.301; the Florida Uniform Fraudulent Transfer Act (UFTA), Fla. Stat. § 726.101 et. seq.[1]; the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. § 1962(a), 1962(c), and 1962(d); and common law causes of action, including breach of fiduciary duty, breach of contract, common law fraud, and negligent misrepresentation.

This plaintiff class which is comprised of approximately 22,000 individuals seeks damages for the alleged fraudulent practices of Multivest Options, Inc., in connection with the marketing and sale of "exchange traded options" (ETO's)

---

1. In the Second Amended Class Action Complaint Plaintiffs claim under UFTA seeks the avoidance of the transfers of the MVRE, SSM, and Cypress stock, worth in excess of $8 million, to Grosfeld an the Jason Grosfeld Trust. In conjunction with the filing of the present Motion, Plaintiffs filed a Proposed Third Amended Complaint, in which Plaintiffs amended their UFTA claim to include Grosfeld's fraudulent transfers to his wife. Plaintiffs additional UFTA claim, unlike the original claim, seeks injunctive relief to prevent Grosfeld's further fraudulent transfer of assets but does not request the avoidance of the prior fraudulent asset transfers.

on commodity futures contracts.[2] Compensatory damages, conservatively could exceed $100 million. From the inception of the case, the only named Defendant who has had the financial capability to satisfy a judgment of this magnitude is Defendant James Grosfeld. However, as explained below, Defendant Grosfeld has been fraudulently transferring individually held assets into joint ownership with his wife, a resident of Michigan.

---

2. A futures contract is an agreement to make delivery (to "sell" or to "short" a contract), or to take delivery (to "buy" or to "go long" in a contract) of a commodity at a designated time and place in the future at a price agreed upon when the parties enter into the transaction. Both parties to a futures contract are obligated to fulfill the contract at a specified price, although futures contracts may be fulfilled by making or taking delivery or by entering into an offsetting futures contract. Delivery of the underlying commodity, however, is not made in the vast majority of exchange-traded futures contracts. Instead, the parties typically close out the futures contract prior to the last delivery day of the contract by entering into an offsetting futures position on the relevant exchange. Thus, both buyers and sellers of a futures contract usually close their positions before the contract matures by making an offsetting purchase or sale.

ETOs can either be purchased (taking a "long" position) or sold (taking a "short" position). The purchaser or buyer of an option has the right but not the obligation to take delivery (these are called "call options") or to make delivery (these are called "put options") of the underlying futures contract at a specified price ("strike price"), for a specified period of time. The purchaser of an ETO can exercise it at any time before the expiration date of the option, which is set at the time of the purchase of the options. ETOs on futures contracts are traded on the same exchanges that trade the underlying futures contract.

Appendix F

The Motions presently before this Court seek to address Grosfeld's fraudulent conduct by requesting entry of an order restraining him from further transfers. As the Court explains below Plaintiffs have demonstrated that they will likely prevail on the merits, at least as to the Florida "boiler room" claim. However, as also explained below, the current state of Eleventh Circuit and Florida law precludes the Court from granting the relief sought by Plaintiffs, because UFTA authorizes injunctive relief only in an action to set aside a transfer, which relief is not sought in Plaintiffs Proposed Third Amended Complaint[3] and because Plaintiffs who only seek monetary damages, have an adequate remedy at law.

While the Court believes that it is compelled by current law to deny Plaintiffs' Motions, this Court shares Plaintiffs' concern that at the conclusion of this case, the 22,000 person Plaintiff class may win nothing more than a paper judgment due to Defendant Grosfeld's continued fraudulent dissipation of his remaining assets[4] or due to insurmountable practical difficulties preventing enforcement of any judgment obtained in this forum, in Michigan.[5]

---

3. Although Plaintiffs do seek the avoidance of the MVRE, SSM, and Cypress stock transfers in the Proposed Third Amended Complaint, Plaintiffs do not request the avoidance of the fraudulent transfers to Nancy Grosfeld, the transfers at issue in this Motion.

4. The potential for this devastating result is exacerbated by the fact that this Court cannot hear this case prior to May 1996, more than one year from now, due to the fact that the Court has scheduled two criminal trials successively, each of which is anticipated to last approximately four months, beginning in late May 1995.

5. Defendants have represented to this Court that they would vigorously oppose Plaintiffs' efforts to enforce any judgment against

(Cont'd)

Appendix F

THIS COURT has considered Plaintiffs' Motions, Defendants' Responses, Plaintiffs' Replies and the supplemental arguments of Counsel at the February 21, 1995 hearing and the pertinent portions of the record, and being otherwise fully advised in the premises, this Court finds as follows:

I. FINDINGS OF FACT

A. The Parties

1. Multivest Options, Inc. (MOI) was in the business of soliciting the public by mass mailings and by telephone, to invest in commodity options and was registered as a futures commission merchant with the CFTC. In early 1990 MOI discontinued doing business and consented to the entry of a preliminary injunction in an action brought by the Commodities Future Trading Commission (CFTC), *CFTC v. Multivest Options Inc.*, Civil Action No. 90-6050-CIV-Zloch (S.D. Fla. 1990).

2. Defendant International Precious Metals Corporation (IPMC) is the parent of MOI, owning 100% of MOI's stock. IPMC also was in the business of soliciting the purchase of precious metals from the investing public. IPMC discontinued active business operations in 1990, due to the CFTC's action against MOI.

(Cont'd)

Grosfeld's jointly held assets in Michigan, on a class-wide basis. According to Defendants, Plaintiffs' must obtain individual judgments for each Plaintiff in Florida and then file individual collection actions in Michigan. The Parties have not briefed these issues.

3. Defendant Multivest, Inc. (MVI) is the parent of Defendant IPMC and owns all of IPMC's stock. Plaintiffs allege upon information and belief that MVI was in the business of trading commodities and of running IPMC and other subsidiaries.

4. Defendant James Grosfeld (Grosfeld) was at all relevant times the person who controlled all MVI's stock. Grosfeld owned a substantial majority of the MVI shares and the remaining shares were owned by the Jason Grosfeld Trust, which Grosfeld controlled in his capacity as trustee.[6]

B. History of this Matter

5. On January 23, 1990, the CFTC brought an action against MOI in the United States District Court for the Southern District of Florida, Civil Action No. 90-CV-6050-Zloch. The CFTC Complaint alleged, *inter alia*, that MOI's salespeople solicited customers to purchase ETOs from MOI by means of "hyped telephone sales techniques" which routinely included false, deceptive or misleading statements concerning the risks associated with these types of investments, and the experience and expertise of MOI's

6. Defendant Grosfeld is sued both individually and as trustee for the Jason Grosfeld Trust, a trust set up for the benefit of Grosfeld's minor son and for which Grosfeld serves as trustee. Also named as Defendants are Multivest Real Estate, Inc. (MVRE), S.S. Melbourne, Inc. (SSM), and the Cypress Group, Inc. (Cypress). These Defendants, however, are named solely with respect to specific claims involving fraudulent transfers which Grosfeld made to himself and the Trust at about the time the Commodity Futures Trading Commission (CFTC) sued MOI for fraudulent sales practices and put MOI into receivership.

salespersons. The sales force was alleged to consist of between 135 and 230 salespersons at MOI's offices in Ft. Lauderdale, Florida, Boca Raton, Florida, Newport Beach, Florida, and San Diego, California. *See* Complaint for Preliminary and Permanent Injunctions and Ancillary Equitable Relief, filed on January 23, 1990 in 90-6050-CIV-ZLOCH.

6. On May 9, 1990 the Federal District Court entered an Order of Permanent Injunction and Ancillary Equitable Relief, which *inter alia* permanently enjoined MOI from operating as a futures commission merchant and appointed a receiver to wind down its affairs.

7. On April 23, 1990 this action was filed, in the Northern District of California. Then on August 23, 1990 this matter was transferred to the Southern District of Florida and assigned to Judge James C. Paine.

8. On February 21, 1991, Plaintiffs filed an "emergency" motion for an asset freeze, pursuant to Rule 65, Fed.R.Civ.P. This Motion was denied by Judge Paine on November 19, 1991 (D.E. #88).

9. On October 11, 1991 this case was reassigned to Judge Shelby Highsmith and then on December 23, 1992, this matter was reassigned to this Court.

10. On March 1, 1993, Magistrate Judge Brown recommended that Plaintiffs' Motion for Class Certification be granted (D.E. # 137); and, on June 25, 1993, this Court entered its order adopting the Magistrate Judge's Recommendation to certify a class (D.E. # 150).

11. On November 17, 1993, Plaintiffs' filed a Renewed "Emergency" Motion for a Temporary Restraining Order and Preliminary Injunction pursuant to Rule 65, Fed.R.Civ.P. That motion was denied on November 24, 1993 (D.E. # 215) because Plaintiffs could not demonstrate that they lacked an adequate remedy at law.

B. The Asset Transfers

12. In April, 1990, Defendant Grosfeld transferred $31 million worth of Treasury Bills in several installments from his exclusive ownership to joint ownership with his wife, Nancy Grosfeld. *See* Schedule of Transfers-Spouse, Dep. Exh. 1, Exhibit H to the Declaration of Neil A. Goteiner in Support of Plaintiffs' Emergency Motion for Preliminary Injunction Under Fraudulent Transfer Claim; Emergency Motion in the Alternative for Leave to File Amended Complaint; and Emergency Motion in the Alternative for Preliminary Injunction under Proposed RICO Claim (dated January 17, 1995) (hereafter "Goteiner Decl.").[7]

---

7. Mr. Grosfeld has produced little reliable evidence as to when this transfer actually occurred, especially as to the first installment of the transfer, which Grosfeld says he recalls occurring on April 23, 1990 — the day the complaint in this case was filed. Deposition of James Grosfeld (hereafter "Grosfeld depo."), November 30, 1994, 44:2-13, Goteiner Decl. Exh. G. In response to Interrogatories, Grosfeld prepared a document entitled "Schedule of Transfers-Spouse" which stated only that the transfers occurred in April, 1990. Dep. Exh. 1, Goteiner Decl. Exh.H. Grosfeld's counsel later sent via facsimile what purports to be a couple of unsworn (one is even unsigned) bank memoranda indicating that certain funds were transferred from Grosfeld's individual custodial account to a joint

(Cont'd)

13. In November, 1993 Defendant Grosfeld transferred approximately $8.5 million worth of stock in the Copart Corporation from his exclusive ownership to joint ownership with his wife, Nancy Grosfeld. *See* Dep. Exh. 1, Goteiner Decl. Exh. H; Grosfeld depo. November 30, 1994, 55:8-59:8, Goteiner Decl. Exh. G.

14. In January, 1994 Defendant Grosfeld transferred approximately $1 million in cash and $18 million in limited partnership interests from his exclusive ownership to joint holdings with his wife, Nancy Grosfeld. Dep. Exh. 1, Goteiner Decl. Exh. H.

15. Prior to these transfers, James Grosfeld had a net worth in excess of $126 million and all of his assets were held individually with the exception of residences valued at approximately $2 million and a single bank account valued at between $0 and $10 million. Grosfeld depo. November 30, 1994, 47:1-17, Goteiner Decl. Exh. G. As a result of these transfers, Grosfeld's individually held assets have an approximate value of $68 million. Grosfeld Decl. P 12.

(Cont'd)

custodial account on April 23, 1990. Goteiner Decl. Exh. R. No other documentary evidence relating to the joint custodial account or the April 23 installment was produced. The documentary evidence from March and April of 1990 relates solely to the joint money market checking account (No. 160977067), which was opened in March and to which the second installment of funds was apparently transferred on April 28, 1990. Goteiner Decl. Exh. R; Exhibit B to Defendant James Grosfeld's Preliminary Response to Plaintiffs' Supplemental Brief on Plaintiffs' Motion for Preliminary Injunction Under Proposed Fraudulent Transfer Claim.

16. The transferred assets have increased in value such that over $100 million of assets are now held as joint assets. *See* Calculations and citations to evidence in Plaintiffs' Emergency Motion for Preliminary Injunction Under Fraudulent Transfer Claim, at 7-10 and nn. 16, 17, 18, and 19; Grosfeld depo., November 30, 1994, 25:3-23; 85:4-87:7, Goteiner Decl. Exh. G.

1. Evidence of Actual Fraudulent Intent

17. Defendant Grosfeld made the transfers with actual intent to hinder, delay, or defraud his creditors.

18. The transfers from Grosfeld bear the following badges of actual fraudulent intent, as defined by the Uniform Fraudulent Transfer Act, Fla. Stat. § 726.105(2) (hereinafter UFTA): the transfers lacked consideration; the transfers were to a family member; there was pending or threatened litigation against Grosfeld at the time of the transfers; there was insolvency of substantial indebtedness on Grosfeld's part when the transfers were made; the transfers were concealed from Plaintiffs and the Court; and Grosfeld retained control over the transferred property.

19. Grosfeld received no consideration in exchange for the transfers. Grosfeld depo. November 30, 1994, 44:2-13, 50:1-51:2, 60:17-22, 61:3-62:4, Goteiner Decl. Exh. G.

20. All transfers were made to Defendant Grosfeld's wife, Nancy Grosfeld, a resident of Michigan. *Id.*

21. All transfers occurred when Grosfeld was either a potential Defendant in a threatened action or a named Defendant in a pending matter. The first transfer of assets occurred in late April 1990. Although the transfer occurred prior to the filing of this action Groseld had knowledge of his potential liability to the Plaintiff class and knowledge that a class action arising from the actions of MOI, was likely to be filed.

22. Grosfeld must have been aware of his potential liability or MOI's actions because during the pendency of the CFTC action, specifically from January 23, 1990 to March 8, 1990, Grosfeld's attorneys were concerned that Grosfeld would be named as a Defendant in the CFTC matter, and during the settlement negotiations in William Waters' administrative action against MOI, in early April 1990, Plaintiffs' Counsel specifically discussed with Grosfeld's Counsel, the fact that Grosfeld was potentially liable for MOI's conduct. Robert Jackson notes, Dep. Exh. 425, Goteiner Decl. Exh. J. *See* Dep. Exh. 737, Exhibit 32 to Declaration of C. Brandon Wisoff in Opposition to Defendants' Motion *in limine* Regarding Alleged Hearsay Evidence, Including the Isakow "Observations" Report (D.E. 490); Consent to Order Appointing Temporary Administrator by Multivest Options (March 8, 1990) in *Commodity Futures v. Multivest Options,* Civ. No. 90-CIV-6050-ZLOCH (D.E. 13); Goteiner Decl. Exh. S.

23. The following events further illustrate that Grosfeld had knowledge that an action was likely to be filed against him and others, after the resolution of the CFTC action: during March and April 1990, Plaintiffs' counsel openly

investigated MOI's operations, including interviewing an MOI attorney, an MOI Officer, and numerous former MOI employees; upon settlement of the CFTC suit, Grosfeld was informed by several MOI attorneys that the potential existed for a class action following the conclusion of the enforcement action; on April 24, 1990, Larry Hunter, an attorney who represented Grosfeld for many years in a variety of matters, including the enforcement action against MOI, contacted Plaintiffs' counsel regarding the class action Complaint, which was about to be filed; and then on April 24 and 25, 1990 Plaintiffs' counsel corresponded with Mr. Hunter about the impending class action. Goteiner Decl. P 4-9; Goteiner Decl. Exh. A, B, G, I, L; Grosfeld depo. September 30, 1994, 1111:24-1112:4, 1209:10-1211:1; Deposition of Robert Jackson, 21:16-25; Deposition of Larry Hunter, 29:1-13; 131:2-12; 386:22-387:20.

24. When the second and third transfers were made this matter was pending, Grosfeld had been named as a Defendant, and Grosfeld clearly had knowledge of his potential liability.

25. The transfers occurred concurrently with key events of the case. The April 1990 transfer occurred contemporaneously with the filing of the action. The November 1993 transfer was made shortly after Plaintiffs filed their Motion for Summary Adjudication of Grosfeld's Liability under the Boiler Room Statute. Plaintiffs' Motion Pursuant to Fed. R. Civ. P. 56 for Summary Adjudication of Defendants' Liability Under Florida's Boiler Room Statute (D.E. 184.) And the January 1994 transfers were made around the time the Court ordered Grosfeld's counsel to produce

attorney-client documents relating to MOI which contained potentially adverse references to the shutdown of MOI by the CFTC. Order of Reference to Special Master dated November 30, 1994 (D.E. 218); *see e.g.* Dep. Exh. 425, Goteiner Decl. Exh. J.

26. Grosfeld knowingly rendered himself insolvent by decreasing his individual net worth until it was insufficient to satisfy a potential judgment. Grosfeld was aware, prior to the transfers, that the potential damages in this matter could conservatively exceed $100 million.[8] Grosfeld's knowledge stemmed from MOI's own records and the facts and allegations contained in the CFTC Complaint. *See* Exhibit 26 to the Declaration of C. Brandon Wisoff in Support of Plaintiffs' Evidentiary Submission in Support of Motion for an Order Compelling Defendant to Disclose Financial Information Relevant to an Assessment of Punitive Damages (D.E. 339) (Hereafter "Wisoff Decl.") (MOI generated records in 1989, which were fully accessible to Grosfeld, documented that the Plaintiff class had lost at least $77 million in commissions); Dep. Exh. 737, Exhibit 32 to the Declaration of C. Brandon Wisoff in Opposition to Defendants' Motion *in Limine* Regarding Alleged hearsay Evidence, including the Isakow "Observation" Reports (CFTC Complaint alleged that from June 1987 to October 1989 MOI customers lost approximately $72,708,000 on a total investment of $96,482.600 and that MOI customers paid commissions of over $61,000.000). And yet Grosfeld transferred in excess of $58 million, decreasing his individual

8. Damages under the Florida "boiler room" statute alone, could potentially exceed $300 million. *See Kane v. Shearson Lehman Hutton, Inc.*, 916 F.2d 643, 646 (11th Cir. 1990).

net worth to $68 million, which was clearly insufficient to satisfy his potential liability.

27. On November 23, 1993, Grosfeld informed this Court that he was not "secreting" assets, in order to frustrate a judgment in this case. Transcript of Proceedings, November 23, 1993 at 77, Goteiner Decl. Exh. C. And yet contemporaneously, Grosfeld transferred at least $8.5 million worth of Copart stock from individual holdings to joint ownership with his wife. An then in January 1994, Grosfeld transferred an additional $19 million in assets to joint ownership with his wife.

28. Lastly, Grosfeld retained control of the transferred property by maintaining a joint undivided interest in the entireties, in the property.

2. Evidence of Constructive Fraud

29. The asset transfers rendered Grosfeld insolvent, as defined by UFTA. *See* Fla. Stat. s. 726.105(1)(b).

30. Damages in this action could conservatively exceed $100 million. After the asset transfers, Grosfeld's individually held assets totalled approximately $68 million. Grosfeld Decl. P 12. As a result of Grosfeld's asset transfers in excess of $58 million, Grosfeld's individually held assets were insufficient to satisfy a potential judgment and therefore, Grosfeld was insolvent.

Appendix F

II. CONCLUSIONS OF LAW

1. This Court finds as a matter of law, that *James Grosfeld's asset transfers were intentionally fraudulent*, as defined by UFTA. *See* Fla. Stat. § 726.105(1)(a).

2. This Court finds as a matter of law, that *James Grosfeld's asset transfers were constructively fraudulent*, as defined by UFTA. *See* Fla. Stat § 726.105(1)(b).

3. While this Court believes that UFTA was designed to prevent the frustration of potential judgments in circumstances similar to those presented by this case, the plain language of UFTA and controlling Eleventh Circuit precedent require the Court to find that Plaintiffs are not entitled to the preliminary injunction sought under UFTA.

4. The plain language of the UFTA provides that remedies are available to creditors "in an action for relief *against a transfer or obligation*. . . ."[9] Neither the Second

9. Fla. Stat. § 726.108 provides:

(1) *In an action for relief against a transfer or obligation* under §§ 726.101-726.112, a creditor, subject to the limitations in Sec. 726.109 may obtain:

(a) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

(b) An attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with applicable law;

(Cont'd)

Amended Complaint nor the Proposed Third Amended Complaint seek relief against Grosfeld's transfers to his wife.[10] Accordingly, Plaintiffs are not entitled to the relief sought.

5. The plain language of the UFTA further provides that the remedies available to creditors under UFTA are "[s]ubject to applicable principles of equity. . . ." *See* Fla. Stat. § 726.108(1)(c). The applicable principles of equity that must be satisfied under UFTA are a substantial likelihood of success

(Cont'd)

> (c) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure:
>
> 1. An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;
>
> 2. Appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or
>
> 3. Any other relief the circumstances may require.
>
> (2) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

(*emphasis added*).

10. In the Second Amended Complaint and Proposed Third Amended Complaint Plaintiffs seek recovery of money damages exclusively.

on the merits; irreparable harm; an inadequate remedy at law; and that the relief sought serves the public interest. *See e.g. Lindholm v. Holtz*, 581 N.E.2d 860, 862-63 (Ill.App. 1991) (equitable standard for preliminary injunction under UFTA requires" 1) a certain right in need of protection; 2) the injunction is necessary to prevent an irreparable injury; 3) there is no adequate remedy at law; 4) plaintiff has a substantial likelihood of success on the merits; and 5) without the preliminary injunction, plaintiff will suffer greater harm than defendant would if the injunction were to issue."); *Bowman v. Dixon Theatre Renovation*, 581 N.E. 804, 807 (Ill. App. 1991) ("plaintiff must establish that he possesses a clearly ascertainable right which needs protection; that he will suffer irreparable harm without the injunction; that there is no adequate remedy of law for his claim; and that he is likely to succeed on the merits of his action.").

6. Plaintiffs have a substantial likelihood of success on the merits, at least as to the "boiler room" claim. The Florida "boiler room" statute, Fla. Stat. § 517.312, provides in pertinent part, that it is unlawful "to directly or indirectly manage, supervise, control, or own, either alone or in association with others, any boiler room in this state which sells or offers for sale any security or investment in violation of [§ 517.301 or § 517.311]."[11] On July 21, 1994 this Court ruled that Defendant

---

11. Fla. Stat. § 517.312 provides as follows:

(1) It is unlawful and a violation of this chapter for any person:

(a) To offer or sell, in this state or from this state, any security or investment when such offer or sale is in violation of s. 517.301 or s. 517.311; or

(Cont'd)

Grosfeld, IPMC, and MVI would be liable, under Fla. Stat. § 517.312, for any violation by MOI of Fla. Stat. § 517.301 or § 517.311. *See* Order Granting Plaintiffs' Motion for Partial Summary Judgment on the Issue of Defendants' Liability under Florida's Boiler Room Statute at 17-18. This ruling was based on this Court's findings that MOI was in fact a "boiler room;"[12] that ETOs constitute "investments;"[13] and that the Defendants,

---

(Cont'd)

> (b) To directly or indirectly manage, supervise, control, or own, either alone or in association with others, any boiler room in this state which sells or offers for sale any security or investment in violation of paragraph (a).
>
> (2) Any purchaser of a security or investment sold in violation of subsection (1) is entitled to rescind such purchase at any time and recover damages as provided in s. 517.211(3)(a), (4), and (6).

12. This finding is in accordance with the plain language of § 517.021(3), which defines a "boiler room" as "an enterprise in which two or more persons engage in telephone communications with members of the public using two or more telephones at one location, or at more than one location in a common scheme or enterprise." Fla. Stat. § 517.021(3). The undisputed facts confirm that MOI employed many salespersons, using telephones in various geographic locations, to sell and promote the sale of ETOs to the public.

13. This finding is in accordance with the plain language of the statute, specifically § 517.312 and § 517.301(2). Fla. Stat. § 517.301(2) defines an investment for purposes of § 517.312, as

(Cont'd)

including Grosfeld, would be liable as "owners" for the actions of MOI."[14] *Id.*; *see also* Order Denying Defendants' Motion for Partial Summary Judgement Determining that the Accounts of Plaintiff Waters and Bartholomew Did Not Constitute an "Investment" Within the Meaning of F.S. § 517.301(2) at 2. To establish a claim under § 517.301 Plaintiffs must prove that "in connection with a securities transaction, they . . . were proximately harmed by, a false representation or omission of a material fact negligently made by [the other party]." *See First Union Brokerage Service v. Milos*, 997 F.2d 835, 844 (11th Cir. 1993) (*citing Gochnauer v. A.G. Edward & Sons, Inc.*, 810 F.2d 1042, 1046 (11th cir. 1987). Plaintiffs are required to prove "transaction causation" but not "loss causation." *See E.E. Hutton & Co. v. Rousseff*, 537 So.2d 978, 981 (Fla. 1989) ("proof of loss causation is not required in a civil securities proceeding under sections 517.211 and 517.301, Florida Statutes."). Based on the facts of this case and the minimal elements which must be proven under § 517.301, this Court concludes that Plaintiffs have a substantial likelihood of success on the merits, as to the Florida "boiler room claim."

(Cont'd)
"any commitment of money or property principally induced by a representation that an economic benefit may be derived from such commitment." Fla. Stat. § 517.301(2). The undisputed facts establish that Plaintiffs committed money to purchase ETOs when MOI was marketing the ETOs by representing that economic benefits could be derived from the transaction. Accordingly, the ETOs constituted investments, for purposes of the "boiler room" statute.

14. Defendants, including Defendant Grosfeld are liable under § 517.312(b) because they "directly or indirectly manage[d], supervise[d], control[led], or own[ed] either alone or in association with others, any boiler room."

7. Plaintiffs seek to recover money damages, which is well-established as an adequate remedy at law.[15] *See* Plaintiffs' Second Amended Complaint and Proposed Third Amended Complaint[16]; *Rosen v. Cascade International, Inc.*, 21 F.3d 1520, 1527 (11th Cir. 1994) ("[i]t is axiomatic that equitable relief is only available where there is no adequate remedy at law; cases in which the remedy sought is the recovery of money damages do not fall within the jurisdiction of equity"). The recoverability of the awarded damages is irrelevant to whether or not an adequate remedy at law exists. *See Mary Dee's Inc. v. Tartmella*, 492 So.2d 815, 816 (Fla 4th DCA 1986) ("test of inadequacy of remedy at law is whether a judgment can be obtained, not whether, once obtained, it will be collectible."); *Hiles v. Auto Bahn Federation, Inc.*, 498 So.2d 997, 998 (Fla. 4th DCA 1986) ("possibility that a money judgment, once obtained, will not be collectible is irrelevant under the test of inadequacy of remedy at law." (*citation omitted*).

---

15. Some jurisdictions have found that preliminary injunctions are appropriate when the defendant intends to frustrate judgment on the merits by transferring assets out of the country. *See e.g. In re Feit & Drexler, Inc.*, 760 F.2d 406, 416 (2d Cir. 1985); *Products Carnic S.A. v. Central American Beef & Seafood Trading co.*, 621 F.2d 683, 686 (5th Cir. 1980). Although these exceptions are not applicable to this case under the present facts, a change of circumstances *will* cause this Court to reconsider the applicability of these exceptions.

16. This Court granted Plaintiffs leave to file a Proposed Third Amended Complaint which alleged a cause of action under UFTA sufficient to encompass Plaintiffs requested relief. *See Lawhon v. Mason*, 611 So.2d 1367, 1368 (Fla. 2d DCA 1993) (respondents not entitled to recovery under UFTA because not sufficiently alleged in complaint).

Based on the foregoing discussion, it is hereby,

III. ORDER

ORDERED and ADJUDGED that Plaintiffs' Emergency Motion for Preliminary Injunction under Fraudulent Transfer Claim is DENIED.

It is further ORDERED and ADJUDGED that Plaintiffs' Motion for Leave to Amend Complaint to State Claim for Preliminary Injunction under the Fraudulent Conveyance Statute is DENIED. Plaintiffs' Proposed Third Amended Complaint is STRICKEN.

It is further ORDERED and ADJUDGED that notwithstanding this decision, should Defendant Grosfeld make *any additional constructive or intentionally fraudulent transfers* under the terms of UFTA, this Court will seriously reconsider this issue.

DONE AND ORDERED in Chambers at Miami, Florida, this 10 day of July, 1995, *nunc pro tunc* for February 21, 1995.

s/ Ursula Ungaro-Benages
URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE

APPENDIX G — DECLARATION OF STEPHEN SENDEROWITZ REGARDING APPLICATION FOR FINAL APPROVAL OF CLASS COUNSEL'S ATTORNEY'S FEES AND COSTS DATED FEBRUARY 20, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 90-6863-
CIV-UNGARO-BENAGES

WILLIAM WATERS AND LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated,

Plaintiffs,

vs.

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, Individually and as Trustee of the Jason Grosfeld Trust, MULTIVEST REAL ESTATE, INC., S.S. MELBOURNE, INC., and THE CYPRESS GROUP, INC.,

Defendants.

DECLARATION OF STEPHEN SENDEROWITZ REGARDING APPLICATION FOR FINAL APPROVAL OF CLASS COUNSEL'S ATTORNEY'S FEES AND COSTS

Appendix G

INTRODUCTION AND SUMMARY OF FINDINGS

1. This declaration summarizes testimony that I would be prepared to offer concerning plaintiffs' application for attorneys' fees in this case. This testimony relies on data collected by plaintiffs' counsel, data I collected, and my experience in the commodities area. I understand that plaintiffs' counsel has already provided empirical data to the Court.

2. In my opinion, an award to plaintiffs' counsel of one third of the $40 million settlement plus costs is fair, reasonable and appropriate. This opinion is based upon the following conclusions:

a. A 33 and 1/3% fee award is within the Eleventh Circuit guidelines on class counsel compensation.

b. The recovery obtained by class counsel in this case was extraordinary in comparison to the average recovery in such actions.

c. The class action was extremely complex and was prosecuted by two law firms over seven years at enormous expense and risk. The small "windfall" above the law firms' lodestar is amply justified both as an appropriate contingent reward for their efforts and to encourage such efforts by other law firms which undertake to attack boilerroom fraud in South Florida.

3. After describing my background, below, I provide additional support for my opinion.

II. BACKGROUND AND QUALIFICATIONS

4. I am a practicing attorney in Chicago, where I have been a member of the bar since 1974. I am a principal of Schwartz, Cooper, Greenberger and Krauss, Chtd. where I chair the firm's litigation department. I received my B.A (1971) and law (1974) degrees at Northwestern University. Upon graduating from law school, I was a trial attorney for the Equal Employment Opportunity Commission (1974-75), and then served as Assistant United States Attorney for the Northern District of Illinois (1975-83). I was appointed Deputy Chief of the Criminal Division (1979), and was placed in charge of all financial crime prosecutions, including commodity cases. The world's largest commodity futures exchanges are located in Chicago and the Chicago U.S. Attorney's Office is the most active prosecutor of commodity fraud cases in the country.

In 1983, I was appointed Deputy Chief of the Special Prosecution Division, and continued to supervise all commodity cases. These cases involved both on-market, and off-market or boilerroom cases. One of my projects was prosecuting Florida boilerroom operators who were victimizing Illinois residents, in the sale of illegal commodity options contracts.

While in the United States Attorney's Office I was requested by the FBI to train its agents in commodity investigations. I was also appointed by the Attorney General

of the United States to head the Commodity Sub-committee of his Economic Crime Council. This position included the responsibility to draft for the Attorney General a nationwide plan to prosecute boilerrooms based on the victim venue concepts developed by me and my assistants in Chicago.

5. In 1983, I left government service and have concentrated in handling complex civil and criminal litigation and regulatory matters, including financial, commodities and securities cases on behalf of corporations, CFTC and SEC registrants and customers.

6. My practice is nationwide, and I have been admitted to practice and prosecuted and defended commodity and securities cases in Federal courts in Illinois, California, Massachusetts, Arkansas, Missouri, Nevada, Michigan, New York, Ohio, Pennsylvania, Tennessee and Texas.

7. I have authored articles published in various publications such as *Futures Magazine*, *Commodities Trading: Trading Practice Under Scrutiny*, (Prentice Hall Law and Business); *New Developments in Commodity Futures Regulation and Enforcement - 1989* (Practicing Law Institute), and the *Illinois Bar Journal- 1990*. I have sat on various commodities and securities seminars for the Practicing Law Institute and Chicago Kent School of Law Commodities Institute. I have also taught ethics courses to commodity brokers, who are required to receive such training pursuant to federal regulation. In 1989, I was appointed Deputy Special Prosecutor for the Chicago election fraud project.

8. I have represented parties in two certified commodities class actions, including *In the Matter of First Commodity Corporation of Boston*, where I represented the individual owners of FCCB and *Kashwer v. Global Precious Metals and Jefferson National Bank*, where I was co-counsel on behalf of plaintiffs. (See discussion at ¶ 17 below.)

9. I have never worked with the Farella firm or with the Raring & Lipoff firm, although I am aware of Mr. Goteiner's reputation as an exceptional commodities law litigator. My contact with Mr. Goteiner includes being Mr. Goteiner's adversary in two extremely hard fought commodities litigations, one involving a putative commodities class action in the retail commodities area. In that class action I joined as co-counsel other well known commodities class plaintiffs' counsel. That commodities class action, like this one, involved allegations of company wide high pressure tactics and fraudulent practices to persuade customers to engage in excessive trading in non-discretionary accounts. The trial court at first certified the class, but Mr. Goteiner was able to persuade the appellate court that the action was improperly certified and to vacate the certification order. The class in that action was not certified again after the vacatur. Class certification is perhaps the hardest fought issue in commodity class actions, and typically revolves around the uniformity of the alleged misrepresentations made to the class members.

III. FACTS SUPPORTING MY OPINION

Complexity of the Case

10. Plaintiffs' recovery in the instant case is much better than would be suggested by a comparison with the average

class action recovery. As a commodities class action, plaintiffs' case was far more difficult to have certified, to maintain and to prove than the average securities class action fraud on-the-market case.

11. I understand that the Court has stated on the record in this case, that plaintiffs' class action theory was far different than the average fraud on-the-market theory since it involved commodities being traded in non-discretionary accounts and required the Court to interpret the Florida Investor Protection Act and Commodity Exchange Act in a way that no other Court has interpreted it. While the facts suggested that there should be a class-wide remedy, the law did not readily supply the theory on which to base the class-wide remedy, while protecting defendants' due process rights. This contrast makes the statistically significantly "above average" recovery all the more meaningful to support plaintiffs' requested one-third fee plus costs.

Comparative Cases

12. Comparing recoveries in other class actions, or governmental regulator actions, underscores how significantly above average this recovery was. I am not aware of any investor recovery in commodities litigation of this sort (either in the class or regulatory context) that approaches what plaintiffs managed to produce here.

Securities Cases

13. The most recent data on class action settlements and fees is to be found in a study conducted by the National

Appendix G

Economic Research Associates ("NERA") entitled "Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions?" prepared by Denise N. Martin, Vinita M. Juneja, Todd S. Foster, and Frederick C. Dunbar (hereinafter "NERA study"). I understand that plaintiffs have already provided a copy of the NERA study to the Court during the preliminary settlement conferences during the week of January 27, 1997. I attach another copy hereto as Exhibit A.[1]

The NERA study covered a period of six years from January, 1991 through June 1996, and looked at shareholder class action case dispositions over that period. NERA's database included 998 cases that were dismissed, settled or resolved by jury verdict during this time period (NERA, at 9).

The NERA study showed that the typical monetary recovery in a class action settlement (calculated as a percentage of class losses and before attorneys fees), was slightly more than 1/4 the recovery in this case.[2] NERA

1. I note from Table 16 that the NERA study did not consider limited partnership cases in 5 out of the 6 years reviewed. These settlements would have affected the average figures reported by NERA.

2. I base this on my understanding that the $40 million recovery is approximately 1/3 of the approximately $119,000,000 in out-of-pocket losses incurred by the class members. I am also assuming that the value of the $30 million in promissory interest bearing notes to be the face value of the notes. This is because the notes are bearing interest and because plaintiffs could, if they wanted to, borrow against the notes, or keep the notes until maturity in 5 years, and then keep them for another five years depending on interest rates as of that time.

calculated the average and median ratio of settlements to plaintiffs' claimed damage and investor losses by settlement amount. (NERA, at 11.) Table 8b of the NERA study considered in part just the 47 settlements in the $10-49.9 million settlement range. Considering just this range of settlements (which includes the settlement amount here), the average settlement as a percentage of investor losses was 9.12%; the median was 5.4%. Considering all 331 settlements ranging from small settlements of under $1 million to settlements of over $50 million (there were only 3 such large settlements reported by NERA), the average settlement as a percentage of investor losses was 9.13% with the median being 5.89%. (*Id.*)

14. For additional comparison purposes, I looked at settlements in securities class action suits involving common stock only (NERA Table 7b). Considering only the January-June 1996 period and the 47 settlements that occurred during that period, the average settlement as a percentage of investor losses was 9.04%, with the median settlement as a percentage of investor losses being 6.84%. Considering all 331 cases over the 1991 to June 1996 period, the average settlement as a percentage of investor losses was 9.13%.

These percentage figures therefore show that the settlement here of slightly over 1/3 of the class' out-of-pocket losses was, relative to these other recoveries, far above average. Thus the instant settlement-to-loss ratio is a healthy multiple of the average and median recoveries for recent securities class action settlements.

15. A study commissioned by the Federal Judicial Center[3] showed that the median gross monetary settlement in class actions in the Southern District of Florida was $2,450,000 (at 149). A $40 million recovery is therefore a relatively large amount, and bound to have a cautionary impact on the industry (particularly in South Florida), since it must be assumed that the industry will understand that this is a large recovery in class action cases.

Other Class Actions

16. The Judicial Center's 1996 study of class actions in four federal district courts considered both securities and other types of class actions. This study included the Southern District of Florida, and concluded that the median settlement in these four courts ranged from $1.98 million in the Eastern District of Pennsylvania, to $2.45 million in the Southern District of Florida, to $5.1 million in the Northern District of California. *See* Judicial Center Study, Figure 70 at 149.[4]

Commodity Cases

17. I was involved as defense counsel in *In re: First Commodities Corporation of Boston Class Action*, No. MDL

---

3. Willging, Hooper and Niemic, "An Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules (1996) (hereinafter "Judicial Center study")

4. The Judicial Center selected these districts as well as the Northern District of Illinois because these districts had considerable experience in class action litigation.

713 (D. Mass). That action, filed in 1986, alleged widespread fraudulent retail sales practices in the sale of futures and option contracts to FCCB customers. *See In Re: FCCB*, 119 F.R.D. 301 (D.Mass.1987).

The CFTC first sued FCCB, and then private counsel filed a class action. Alleged customer losses in that class action exceeded $500 million, and the settlement was $5.3 million, or a percentage recovery of about 1.4%.

In Re: International Trading Group, Ltd. Customer Account Litigation, Civil Action No. CV 89-5545 RSWL (GHKx) (C.D. Cal.), was, according to plaintiffs' counsel in that case, a commodity option case. Of over $490 million in ITG's customer losses, plaintiffs counsel collected approximately $7 million for the class, or a percentage recovery of about 1.5%.

Kashwer v. Global Precious Metals and Jefferson National Bank, (N.D. Ill.), was a class action against a bankrupt broker and the bank which financed customer purchases of the precious metals contracts sold by the broker to plaintiffs. Plaintiff losses were allegedly over $16 million. The plaintiff class received $2.58 million from the bank in settlement, or a percentage recovery of about 16%.

Counsel involved in *In re: Precious Metals Litigation, MDL Docket No. 941*, (C.D.Cal), another bank-financed precious metals class action, has advised undersigned that the case was settled in 1994 for $1.9 million and involved over $80 million in customer losses, or a percentage recovery of no more than 2.4%.

In summary, when comparing the settlement here to other commodities class actions with which I am familiar, it is also apparent in terms of both the absolute amount of recovery as well as the loss-recovery ratios, that this instant settlement was extraordinary.

VI. RECOVERY OF INDIVIDUAL CLASS MEMBERS AND RELATIVE SUCCESS

18. Another significant criterion of plaintiffs' success is the individual recovery to be obtained on average by the class members. After the requested attorneys fees and costs, I am advised that the individual class members here will recover on average $1200. The Judicial Center study found that the average median individual recovery across the four districts averaged from $315 to $528 (at 13). The Southern District of Florida had the lowest, at $315. Also in the Southern District of Florida, 75% of the awards were $715 or lower, and the maximum was $1,505 (Figure 1, at 112). Thus the class members here will recover considerably more both absolutely, and on a recovery-loss basis, than in the average class action, notwithstanding that a retail commodities class action is a more difficult class action to bring and to maintain. Indeed the average recovery of $1200 will be close to the maximum recovery noted in the Judicial Center study for the Southern District.

Appendix G

VII. THIS SETTLEMENT COMPARED TO RECOVERY IN GOVERNMENT REGULATORY ACTIONS

19. I am generally aware of actions brought by the U.S. Attorneys and by the CFTC, and have followed these actions over the years. I am not aware of any commodity regulatory actions which have returned to investors anything close to the recovery obtained by plaintiffs at bar. This is true both in terms of the size of the fund, as well as when considering the ratio of recovery to losses, as well as the average size of the recovery. In the typical boilerroom prosecution by the United States Attorney's Office, while the defendants are almost always convicted and imprisoned, little if any financial recovery is obtained for the victims.

VIII. DATA ON FEE AWARDS

20. Regardless of case size, fees average approximately 32% of the settlement according to the NERA study (at 12-13). In summarizing the data for settlements in the $10-49.9 million range, NERA reported that the average attorney fees (excluding costs) as a percentage of settlement was 31.72% and that median attorneys fees as a percentage of settlement in this range was 33.15% (NERA, Table 9).

21. NERA also reported that the average attorney fees *and* expenses totaled 34.94% of all recoveries, with the median being 34.64%. When plaintiffs' costs are added to their requested one-third fees, this total amount will be 38% of the settlement fund. While plaintiffs' counsel's requested aggregate amount will be greater than the average fees and costs recovery, it is justified for the reasons herein discussed.

Appendix G

IX. CONSIDERATION OF ADDITIONAL FACTORS IN DETERMINING REASONABLENESS OF FEES

Camden I

22. Plaintiffs' one-third request of $13,333,333 is not significantly greater than what I am advised is plaintiffs' lodestar at 1997 rates ($12,634,000), so that plaintiffs are not asking for any significant multiplier over their fees, and only a small adjustment for the risk and time cost of money and their investment of the considerable out-of-pocket costs ($2.6 million in costs). In this regard, the percentage approach, required by *Camden I Condominium Association, Inc. v Dunkle*, 946 F.2d 768 (11th Cir.1991), would not result in any significant windfall to plaintiffs' counsel.

Length of Case

Class actions rarely get this far, and almost never last this long from the date of filing. This case was filed in April 1990, and ended in January 1997, after 5 months of trial. The Federal Judicial Center study determined that in the Southern District of Florida the median time from filing to disposition of securities class actions to be 17.5 months (Judicial Center study at 117, Figure 10). In the Northern District of Illinois the median was 19.9 months and in the Northern District of California it was 23.7 months (*id.*).[5]

5. It is because of this extraordinarily length, and the commensurate risk that plaintiffs' counsel endured, that it is appropriate and fair that the median fee recovery rate of 27% in this district be adjusted upwards to take account of these factors (*see* Judicial Center study, at 147).

Thus, this class action obviously took far longer than the average securities class action to resolve. This means that plaintiffs had to fund this action with its considerable costs, and to delay their receipt of any reimbursement and fees more than four times as long as other plaintiffs' attorneys in this District. Given the time value of money, a delayed fee is a reduced fee, and this factor alone could justify a higher than average fee award.

Risk Factors

23. This risk factor was particularly significant here. I am advised the Farella firm and Raring & Lipoff firm shouldered the risk and burden of this litigation by themselves. Often, there are at least 5-10 firms that share the burden in such cases.

X. CONCLUSION

24. In conclusion, I believe that the requested fee equal to one third of the settlement fund, plus costs is entirely reasonable. It is both justified in this case and justified for the motivation it creates for future cases against other retail commodities firms, particularly in South Florida where it is well known that commodities boiler rooms have proliferated. Further a lesser fee award might telegraph to other plaintiffs' attorneys in similar cases in the future to settle cheaply and not to resist the defendants' litigation onslaughts and low settlement offers. A lesser fee award may indicate to plaintiffs' attorneys that to hold out for more, and to go to trial, would only result in increased risk for the attorneys with no upside benefits.

Appendix G

I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge, information and belief.

s/ S. Senderowitz
Stephen J. Senderowitz

February 20, 1997
Chicago, Illinois

APPENDIX H — DECLARATION OF NEIL A. GOTEINER IN RESPONSE TO THE APRIL 24, 1997 DECLARATIONS OF MARTIN KAMINSKY AND PAUL DODYK DATED MAY 5, 1997 AND FILED MAY 6, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 90-6863-
CIV-UNGARO-BENAGES

WILLIAM WATERS AND LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated,

Plaintiffs,

vs.

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, Individually and as Trustee of the Jason Grosfeld Trust, MULTIVEST REAL ESTATE, INC., S.S. MELBOURNE, INC., and THE CYPRESS GROUP, INC.,

Defendants.

DECLARATION OF NEIL A. GOTEINER IN RESPONSE TO THE APRIL 24, 1997 DECLARATIONS OF MARTIN KAMINSKY AND PAUL DODYK

I Neil A. Goteiner declare as follows:

1. I am a member of the law firm of Farella Braun & Martel LLP. I am licensed to practice law in the States of California and New York.

2. I am submitting this declaration in opposition to certain statements in the April 24, 1997 declaration of Martin Kaminsky and the April 24, 1997 declaration of Paul Dodyk.

3. Mr. Kaminsky states that "most" of his settlement discussions with me were off the record. In fact we explicitly agreed that all of those settlement discussions were off the record. All those discussions were privileged pursuant to Rule 408 of the Federal Rules of Evidence, and are irrelevant and improper to bring before this Court's attention.

4. To correct the false record created by Mr. Dodyk's and Mr. Kaminsky's declarations, I respond to their claims that plaintiffs' fees and expenses were the result of plaintiffs' counsel intransigence and unreasonable settlement position. The truth is that defendants made it quite clear that they wanted us to believe that they would not make any serious settlement offer until well into the trial, and further that they would use any tactic, including illegitimate ones, to make this case more expensive and prolonged.

5. I provide the following responses to Mr. Kaminsky's and Dodyk's allegations:

a. Mr. Kaminsky fails to inform the Court that defendants made it quite clear to plaintiffs at the October 1994 mediation and subsequently that defendants were negotiating in bad faith by lying to plaintiffs about Mr. Grosfeld's assets and by "increasing" their settlement offer from $3.0 million to only $3.1 million after plaintiffs reduced their demand from $120 million to $90 million;

b. Contrary Mr. Dodyk's repeated statements, plaintiffs did not insist on $90 million in cash throughout trial up to the evening of January 26, 1997;

c. Neither I nor anyone else on plaintiffs' side breached the Stipulation of Settlement regarding initiating contacts with the media;

d. Plaintiffs expected during the settlement negotiations for there to be far more claims filed than will apparently be the case, in part because of the size of the average claim, the profile of class members, the Stipulation's provisions for efforts to locate class members, and because of the number of claims filed in the MOI Receivership.

Background of Settlement Negotiations

6. I first spoke with Mr. Kaminsky sometime after the September 1994 deposition of Grosfeld, and not in early 1994 as Mr. Kaminsky claims in his declaration. Prior to that time defendants had never made a settlement offer or indicated that they would be interested in hearing a serious offer from plaintiffs' counsel. We tried repeatedly to engage defendants in settlement discussions, including writing a letter to Mr. Wasinger prior to the time that the Court decided our motion for partial summary adjudication of the boiler room claim. Defendants declined to engage in settlement discussions. The explanation that I heard from Mr. Wasinger after the class was certified was that this case would have to be tried, because it was only in the trial context that the Court would understand that the case could not proceed as a class action.

7. Mr. Kaminsky's declaration fails to disclose highly relevant events of what happened in the October 18-19, 1994 mediation. Specifically, Mr. Grosfeld and his counsel took absurd and bad faith positions at the mediation. Plaintiffs, without knowing Mr. Grosfeld's assets, first demanded $120 million which was basically the amount of the classes' losses, without the over $130 million of statutory pre-judgment interest that had already accumulated on these losses. Defendants came back with an offer of $3 million.

8. Plaintiffs then informed the mediator that they could go no further without Grosfeld disclosing his net worth and his assets. We had previously made it clear to Mr. Grosfeld's counsel that we wanted to know his assets before making a formal demand at the mediation. Prior to that time Mr. Grosfeld had declined to provide us with that information. The Court had already ruled that we were entitled to know this information in connection with plaintiffs' punitive damages claim. During the mediation, the Court ordered Mr. Grosfeld to disclose to us the amount of his assets so that we could use this information in connection with negotiating at the mediation.

9. Mr. Grosfeld then disclosed that he had a net worth of $85 million. Plaintiffs believed that he had considerably more based on our own investigations. It turned out after the mediation that in fact he had fraudulently transferred to his wife some $100 million in assets. Mr. Grosfeld also attempted to mislead us on the tax consequences to him of a settlement.

10. In any event, after Mr. Grosfeld made his initial offer of $3 million, we reduced our demand by $30 million to $90 million with the explicit statement that we would reduce our offer "substantially" more if defendants made a good faith counter above their $3 million offer.

11. Mr. Kaminsky then said that he was "increasing" his $3 million offer to $3.1 million. Mr. Kaminsky further said he would not make a serious counter-offer until we actually lowered our settlement demand again. (There was never any discussion whether the $3.1 million settlement would be conditioned on a reversion or that it would be entirely in cash).

12. The mediation thus ended with defendants making it clear to us that they wanted us to bargain against ourselves and that they were not in the least bit interested in paying anything significantly over $3.1 million.

13. Defendants' position was clearly neither reasonable nor logical, since Mr. Kaminsky noted at the mediation, and in front of plaintiffs' counsel and the mediator, that Mr. Grosfeld's exposure was enormous. Mr. Kaminsky told plaintiffs' counsel and the mediator that if class-wide damage and liability questions were going to the jury, then "Mr. Grosfeld's life was over." And it was clear that an offer of $3.1 million was not even a "nuisance value" offer since the case would cost considerably more than that to try. Given that the Court had already certified a class and granted summary judgment in plaintiffs' favor on the boiler room claim, there was no way to view defendants' "offer" as anything other than a bad-faith insult. Mr. Kaminsky then

made it clear to the mediator and to us that before any serious settlements could occur the Court would have to decide defendants' recently filed motions in limine to preclude the jury from hearing class wide damages and liability issues and critical evidence such as the "Isakow Report." Mr. Kaminsky also stated that if defendants were unsuccessful on the class wide damage and liability motions, defendants would have to petition the Eleventh Circuit for a writ of mandamus.

14. Mr. Kaminsky and I happened to take the same plane to New York the evening after the mediation ended and spoke further. Mr. Kaminsky noted that Mr. Grosfeld understood that there was a significant chance that he could lose the case and that the damages would potentially be in the hundreds of millions of dollars. I pointed out that with his own analysis, that defendants' $3.1 million offer could only be construed as absurd and insulting. Mr. Kaminsky explained that the problem with settling now was with potential damages that high, Mr. Grosfeld was paralyzed and could not make a reasonable offer. Mr. Kaminsky said that although it might seem ironic, settlement might only become possible if defendants were successful in precluding the jury from deciding the class-wide liability and damage issues. Mr. Kaminsky said that he also knew that his settlement position could not, and would not, result in a settlement, but that it was all that he could do.

15. Mr. Kaminsky also on this plane ride picked up Mr. Wasinger's theme that it was probable that this case would have to go to trial. I told Mr. Kaminsky that I would not be surprised at this result for two reasons. We had indications

in the documents produced by defendants and from other sources that Mr. Grosfeld's negotiating style often involved keeping his options open until the very last second. (I had previously discussed this point with Larry Bonner as a reason why I thought Mr. Grosfeld intended to try this case irrespective of any reasonable settlement demands plaintiffs made.) It was also obvious to us that Mr. Grosfeld independently had economic incentive to litigate rather than to settle since his assets were generating more than enough income to pay his attorneys fees. Thus it made more economic sense for him to pay litigation expenses instead of funding a settlement before he absolutely had to. And by this time discovery was closed, and the Court during the October 1994 mediation had continued the trial date.

16. The next significant event was a pre-trial conference in January, 1995. The Court had assigned to the Special Master the task of recommending a ruling on defendants' motions in limine to preclude class wide liability and damage verdicts. At that hearing before the Special Master, Mr. Berger suggested that the parties engage in a blind exchange of settlement numbers that would be disclosed to the other side only if the numbers crossed or if they fell within a pre-agreed range of each other. Mr. Berger said he was not pushing settlement, but that he had found this technique to work in other cases where the parties were divided and unwilling to make the first move. Mr. Berger even graciously offered to have his secretary serve as the exchange middle-person. I agreed to this procedure on behalf of plaintiffs. Mr. Wasinger flatly rejected this offer and said defendants would go back to the mediator if and when settlement became an option.

17. The Special Master ultimately recommended denying defendants' "in limine" motions, and the Court then took the matter under submission. As indicated above, the Court had vacated the trial date and continued the trial for approximately one year. Plaintiffs were clearly disappointed by the magnitude of this delay. I therefore suggested to Mr. Kaminsky that plaintiffs would soften in their position given the delay factor and inquired whether he was interested in resuming settlement negotiations before plaintiffs again began in the fall of 1995 to prepare for trial. I received no response at all to this suggestion.

18. The Court on January 17, 1996 basically affirmed the Special Master's R&R. The Court also set a trial date for that Spring. Mr. Grosfeld then unsuccessfully sought the writ of mandamus from the 11th Circuit, as Mr. Kaminsky had promised he would. Shortly after defendants filed the petition for the writ, the Court vacated the Spring 1996 trial date and continued the trial until September 1996.

19. Throughout 1995 and 1996 I attempted to elicit from Mr. Kaminsky a good faith response to our $90 million demand. Throughout this period plaintiffs' case was appearing stronger. But I nonetheless did not increase the $90 million mediation demand, even though: (1) plaintiffs discovered that Mr. Grosfeld had lied about his assets at the mediation and we had discovered that he had $100 million more in his and his wife's joint name than he had disclosed when we made the $90 million demand; (2) the Court in 1995 issued factual findings that Grosfeld had fraudulent conveyed assets to his wife and that plaintiffs had a "substantial likelihood of success" on the merits of the Boiler

Room Claim at least; (3) the Court ruled that the jury would decide class-wide damages and liability - a decision that Mr. Kaminsky said would be the "end of Mr. Grosfeld's life"; (4) defendants were unsuccessful with their writ petition to the 11th Circuit, a petition on which Mr. Kaminsky said he was putting a lot of hope; and (5) defendants' motion in limine to preclude important evidence including the "Isakow Report" was unsuccessful. Plaintiffs were therefore going to trial on our core claims, the Florida Boiler Room, the CEA claim, and the RICO claim, and interest was mounting.

20. Mr. Kaminsky during this period made inconsistent statements regarding settlement. For instance, notwithstanding that Mr. Kaminsky sometimes admitted to me that there was strong plaintiffs' evidence, he said on another occasion that there was "not much" to plaintiffs' case. On one occasion he conceded that the case would likely go to trial because Mr. Grosfeld could not negotiate from a position of weakness and that Mr. Grosfeld did like to keep his options open to the last second. During the summer of 1996 Mr. Kaminsky raised the issue of settlement on his own for the first time since the October 1994 mediation. He told me that the case "should settle", but that Mr. Grosfeld would not pay "hundreds of millions of dollars" to settle the case. I reminded Mr. Kaminsky that our demand was still $90 million, not hundreds of millions of dollars. Mr. Kaminsky, however, was still unwilling to raise the $3.1 million offer unless plaintiffs would first bid against themselves by lowering our demand. I told Mr. Kaminsky then, and on an additional occasion that summer, that plaintiffs were willing to negotiate in good-faith, but that Mr. Grosfeld would have to put a sum of money on the table that showed he was serious about settlement and that he recognized he faced

significant exposure. Notwithstanding this, Mr. Kaminsky never budged. Irrespective of Mr. Kaminsky's various comments, two things were quite clear. First, Mr. Grosfeld was not sufficiently interested in knowing our bottom line to make a good faith offer above his October 1994 $3.1 million figure. Second, it would therefore have been extremely unwise for me to suggest to Mr. Grosfeld that we would bargain against ourselves while Mr. Grosfeld stayed at $3.1 million.

21. I should also note that throughout this period prior to the September 1996 pre-trial, Mr. Kaminsky had conceded from time to time that Mr. Wasinger's overly aggressive and contentious tactics were responsible for much of the unnecessary litigation activity in the matter. Mr. Kaminsky also told me that he was working with Mr. Wasinger to try to get him and the "Honigman" firm to be more cooperative. He said, however, that there was a limit to what he could do because he did not know as much as the Honigman firm about many of the detail of the case. He then told me in 1996 that he was acquiring a bigger say in the case and that we would see a change in defendants' tactics and level of cooperation.

22. Nothing ever changed of course, and it had become clear when Mr. Kaminsky first became involved that Mr. Kaminsky was running his own Mutt and Jeff routine, always pointing the finger to Mr. Wasinger as being the problem - the zealot - but making sure that defendants' litigation tactics remained as overly truculent and vexatious as possible.

23. As I indicated above, it also became clear that Mr. Grosfeld never intended to make any reasonable settlement

offer until he was actually in trial, and that he would attempt to put off that trial and any serious negotiations for as long as possible. Indeed, he tried to put off the September 1996 trial at the last minute by complaining about his back problems and filing another motion for reconsideration and certification for appeal of the January 17, 1996 class wide order. It therefore became clear to plaintiffs that the only chance to settle this matter reasonably was for Mr. Grosfeld to understand that we would not bargain against ourselves, and that we were enthusiastic to have the jury decide the issues. Had we responded any differently to Mr. Grosfeld and his counsel's tactics, it would have made settlement negotiations that much more difficult when he finally did decide it was time for him to discuss settlement seriously. Mr. Grosfeld, in short, left plaintiffs' counsel no alternative but to wait for him to move and to respond to his counsel's tactics.

24. During the pre-trial it was not I who first approached Mr. Kaminsky, contrary to Mr. Kaminsky's declaration. Mr. Bonner suggested in a jocular fashion that the parties should discuss settlement again. I then told Mr. Kaminsky about my exchange with Mr. Bonner and that if defendants were serious, we would be pleased to talk about settlement but that it was up to defendants to indicate that they would negotiate in good faith by offering more than $3.1 million. At that point I never indicated that we were still at $90 million, again contrary to Mr. Kaminsky's declaration.

25. After considering the matter, Mr. Kaminsky said that we should call Mr. Dodyk if we were interested in pursuing settlement. This was the first time we had heard of Mr.

Dodyk's involvement. Mr. Kaminsky said the Mr. Dodyk was familiar with the case and had authority to negotiate on Mr. Grosfeld's behalf. Mr. Kaminsky also suggested that I stay out of the negotiations on plaintiffs' behalf and instead get someone from our firm with less history in the case involved for settlement purposes. It was then that I had Mr. Anderson call Mr. Dodyk. None of this happened, however, until the case was already going to trial. Because Mr. Anderson was a member of the trial team, he had to quickly bow out of the negotiations at which time Mr. Cooper became involved. It was during Mr. Anderson's initial discussions with Mr. Dodyk that defendants raised for the first time the possibility of an offer containing a non-cash component. It is clear therefore that defendants' strategy all along was to stonewall until it was crystal clear that the case was going to a jury.

26. I will also add here that defendants' offers were completely unacceptable until the $40 million offer made the night before closing argument. Prior offers were below that amount by in excess of $10 million. This further confirmed that Mr. Grosfeld was always holding out to the last moment to see if we would blink.

Response to Defendants' Claimed Breaches of the Settlement Stipulation

27. Mr. Dodyk's claims that the differences between his and plaintiffs' counsel's interpretations of the Stipulation of Settlement amount to plaintiffs' breaches of the Stipulation. I will not address those allegations since they are clearly not violations, as the Court has so found.

Appendix H

28. I will address one allegation in ¶10 of Mr. Dodyk's declaration - that I breached the stipulation's proscription against initiating contact with the media. Mr. Dodyk's allegations are completely untrue. As also discussed in Mr. Cooper's declaration, I picked up a telephone message on January 31, 1997 from an AP reporter, Catherine Wilson. I was about to board a plane at the Miami airport after the hearing, and listened to this message: "Hi, Cathy Wilson calling from Associated Press. I was calling for a comment on the MultiVest settlement agreement. I'm in Miami, 305/ 594-5825. Thank you." (I still have a tape of the phone mail message). I returned the phone call and Ms. Wilson told me that she heard about the settlement from an AP stringer or reporter who was in the Courthouse that morning. She asked me questions and I answered them.

29. I spoke with defendants' counsel after the AP article appeared (I believe either Mr. Dodyk or Mr. Bonner) when he raised questions about the article and gave him Ms. Wilson's number and explained the above facts.

30. Sometime during the following two weeks I heard from Ms. Wilson that Mr. Bonner and Mr. Kaminsky had both interviewed her in person at their offices. I understand from Ms. Wilson that she confirmed precisely what I have testified to above.

31. I also had a telephone conference with Mr. Cooper and Mr. Dodyk, as accurately described in Mr. Cooper's declaration submitted herewith.

Appendix H

Plaintiffs' View of the Number of Claims To Be Filed:

32. Plaintiffs have already informed the Court that we were surprised by the rate at which class members are filing claims, according to recent reports of Mr. Buchband, the Settlement Administrator. Plaintiffs felt that the rate would be higher Indeed, the experience of the MOI Receiver suggested that class members would be far more interested in filing claims. The Receiver informed us that when he sent out notices only to those class members who had purchased ETOs within the last two years of MOI's existence, he received close to 3000 claim forms totaling close to $30,000,000 in claims. The Receiver had under $300,000 to distribute.

33. In contrast, we were contacting all 20,000 members from all 5 years of MOI's existence in the ETO market, and informing them that there was a $40 million fund, and that they could expect to receive some 20% of their losses. Given the average MOI ETO customer loss of $6000, this amounted to an average $1200 recovery per each class member for simply filing the claim.

34. In addition, the Settlement Stipulation and modern address location methods assured us that we would be locating the vast majority of all class members, thereby increasing further the number of class members that we expected to file claims. I do note here that defendants fought our efforts to have the settlement administrator resend the notices that had been returned by using a credit bureau search service. I also believed when I agreed to settle the case, and I believe now, that it would have been even more difficult to

locate class members and get them to return claim forms had the litigation continued through more years of appeals.

I declare under penalty of perjury that the forgoing is true and correct and that I could so competently testify if called upon to do so.

Executed at San Francisco, California, this 5th day of May, 1997

s/ Neil A Goteiner
Neil A Goteiner

APPENDIX I — DECLARATION OF JOHN L. COOPER IN RESPONSE TO APRIL 24, 1997 DECLARATION OF PAUL M. DODYK DATED MAY 5, 1997 AND FILED MAY 6, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 90-6863-
CIV-UNGARO-BENAGES

WILLIAM WATERS AND LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated,

Plaintiffs,

vs.

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, Individually and as Trustee of the Jason Grosfeld Trust, MULTIVEST REAL ESTATE, INC., S.S. MELBOURNE, INC., and THE CYPRESS GROUP, INC.,

Defendants.

DECLARATION OF JOHN L. COOPER IN RESPONSE TO APRIL 24, 1997 DECLARATION OF PAUL M. DODYK

I, John L. Cooper declare as follows:

1. I am a member of the law firm of Farella, Braun and Martel, LLP. I am licensed to practice law in the State of California.

Appendix I

2. I submit this declaration to respond to certain statements in Paul Dodyk's April 24, 1997 declaration.

3. Much of Mr. Dodyk's declaration relates settlement discussions that were privileged pursuant to Rule 408 of the Federal Rules of Evidence, were off the record, irrelevant, and are improper to bring before this Court's attention even if they were accurately described, which they are not.

4. Mr. Dodyk swears twice that plaintiffs' counsel was adamantly insisting on $90 million in cash up until the evening of January 26, 1997 when we first reached agreement on the amount of the settlement fund (Dodyk Declaration ¶¶ 6 and 27). This is untrue. I refer the Court to Mr. Goteiner's declaration for a description of plaintiffs' settlement position prior to September 1996 when I became involved with Mr. Dodyk in settlement negotiations. By the time of my involvement, Mr. Anderson of plaintiffs' trial team had already had several conversations with Mr. Dodyk regarding a possible approach toward settlement which involved a combination of cash and other consideration. I was brought into the negotiations at that point. During my first conversation with Mr. Dodyk, he suggested that we explore the idea of a settlement which included warrants on stock held by Mr. Grosfeld as well as a cash payment. I agreed on behalf of plaintiffs to consider and evaluate Mr. Dodyk's first suggestion that the settlement fund be some mixture of cash and warrants on stocks, as long as the class would be fully protected and secured to the extent that warrants were part of the settlement fund. Over the course of September and October, 1996, Mr. Dodyk informed me that he and Mr. Grosfeld had decided that warrants would not work, and they

then suggested that plaintiffs consider a mixture of cash and promissory notes or deferred obligations secured by a letter of credit. We agreed to evaluate and negotiate regarding that approach and as a result made it clear that we were not demanding an all cash settlement.

5. In none of these settlement discussions did I once say, or even suggest to Mr. Dodyk, that plaintiffs were insisting on $90 million. For most of this period of settlement discussions, all of my focus and that of my partner, Jeff Newman, was on negotiating and drafting the Settlement of Stipulation and the underlying documents which specifically provided that no more than 25% of any settlement payment would be in cash. We did not discuss the amount of the settlement fund with Mr. Dodyk until after we had resolved the settlement documents. The idea was that we wanted to have binding documents in place in the event the parties could agree on a number; we did not want to exchange numbers, only to have the settlement then break down in a dispute over terms of payment, security, or other issues. We thought this approach of having executed documents prior to exchanging settlement numbers critical to protect the class and to end the litigation at a fair and reasonable settlement amount. We believed, based on defendants' prior settlement strategy, as discussed more fully in Mr. Goteiner's declaration, that defendants would misuse predictable debates over settlement terms. When I came into the negotiations there was a very low level of trust between the opposing parties which made the negotiations difficult. Thus, it was not until the last weeks prior to the evening of January 26, after we had the completed and fully executed settlement documents, that we began to try to reach a mutually acceptable settlement amount.

6. During the September-January period we negotiated virtually every paragraph of the settlement papers. It was only because of those negotiations and drafting efforts that we were eventually able to exchange numbers (wherein we ultimately reached agreement as to the $40 million on January 26) and to present the completed settlement papers to the Court the following day. The draft documents which were exchanged between the parties during this period make clear that beginning in September 1996, the parties were negotiating on a combination of cash and warrants or promissory notes or deferred obligations.

7. Mr. Dodyk also swears that the: ". . . clear sailing provision in this Stipulation was presented to me by plaintiffs' counsel as a nonnegotiable demand. I had no alternative but to accept it if there was to be any prospect of settlement." (¶21; see also ¶23). This is untrue in several respects. First as I mentioned above, every paragraph of these settlement papers were negotiated at arms length, and often repeatedly revisited and modified. I never told Mr. Dodyk that defendants' non-objection to our fee and costs request was non-negotiable or a deal-breaker. I told him, that this provision was important to plaintiffs to end this lengthy and bitter litigation because we expected that without it that Mr. Grosfeld would attempt to continue the litigation or dispute any fee award for years to come. We were not concerned about judicial scrutiny of our fee request or the fees awarded. We knew that the Court, having presided over the litigation for four years and having conducted a five-month trial, had a more than adequate basis on which to evaluate our fee request. We were, however, concerned about Mr. Grosfeld, as opposed to class members, prolonging the litigation by

frivolous objections to our fee request. Because Grosfeld was to have a reversionary interest in the settlement fund, we wanted him to acknowledge a percentage of the final settlement fund to be paid as fees and thus end the hostilities once and for all. The purpose of the settlement was to bring about peace, not merely to change the nature of future disputes.

8. The negotiations on this issue were that I informed Mr. Dodyk that we would *limit* our fee request to 1/3 of the as yet to be agreed settlement fund and requested that the defendants not object to such a fee request plus payment of expenses; defendants had the right to object if we sought any fee more than 1/3 of the fund. Presumably this fee ceiling was important to Mr. Grosfeld since Mr. Dodyk informed me that Mr. Grosfeld and he were expecting a reversion. To the extent our fee was higher, the reversion to Mr. Grosfeld would be smaller. Therefore it was important for Mr. Grosfeld to know what his likely reversion would be under various scenarios so that he could then better estimate the upper limit of his exposure.

9. Mr. Dodyk responded to my request by agreeing that the defendants would not object to our fee request of 1/3 of the settlement fund plus costs and expenses.

10. Plaintiffs agreed to this 1/3 ceiling on our request for fees knowing that prevailing 11th Circuit law supported an award of 1/3 of the settlement fund as fees (or an even higher percentage depending on the circumstances). Indeed, the *Camden I* decision noted that 20% to 30% of the settlement fund is the norm, with 50% being the upper limit.

Appendix I

It is the extraordinary case, such as the one at bar, that ever goes to trial, let alone lasts 7 years with a five-month jury trial. This Court cited that law in making its fee award on March 31, 1997. We were also aware at the time that we negotiated the 1/3 fee ceiling that, depending on the course of trial and the Court's rulings (particularly on jury instructions and special interrogatories) that we risked a fee award that could be less than our lodestar. We were also fully aware at the time that in any event the Court would be fully aware of this agreement and would, on its own, ask all the questions it had about our fees, that the Court had been through fee petitions before, and that the Court was very familiar with this case for purposes of making fair and reasonable fee rulings. We also expected that class members would not shrink from raising objections to our fees if they had any. Finally, we agreed in the settlement documents that if class members objected to our fees or appealed from our fee award, that fact would not prevent the settlement itself from going forward for the class. Thus, class members were fully protected, defendants had certainty concerning the upper limits of their exposure and the parties moved toward an end to the hostilities. We subsequently agreed with the Court to waive any appeal with respect to the Court's decision on the portion of any fee award to be paid in cash as opposed to other obligations. We believed, therefore, that the Court had before it all of the relevant facts, and ample flexibility to decide the fee award independent of the reasonableness of the settlement.

11. Defendants have raised several points about the reversion provision in the Stipulation of Settlement. Plaintiffs agreed to the reversion provision for several reasons. First,

Mr. Dodyk insisted on it. Second, Mr. Dodyk made it quite clear that with the reversion, Mr. Grosfeld would increase his offer to the class above what he would otherwise offer. Third, plaintiffs were agreeable to the reversion because it would increase the size of the settlement fund to the class, thus creating a larger award for claiming class members. As Mr. Goteiner points out in his declaration, we thought that the relatively large average award per customer resulting from the $40 million settlement fund would generate motivation for most class members to file claims.

12. During the settlement conference on January 28, 1997 in the Court's chambers, Mr. Dodyk spoke favorably about the size of the settlement fund and how it compared favorably with both the NERA study and the study of settlements with which Mr. Dodyk's firm had been involved. At that point, Mr. Dodyk and his clients had agreed to the reversion feature in the signed settlement agreement and Mr. Dodyk had received a letter from Mr. Buchband stating that Mr. Buchband expected approximately one third of the class to claim. (As we have previously informed the Court, plaintiffs did not see Mr. Buchband's estimate until after the January 31 preliminary approval conference and defendants had submitted it to the Court). Yet Mr. Dodyk did not suggest in chambers on January 28 that the Court should consider the number of claims filed in evaluating either the fairness and reasonableness of the $40 million settlement fund or the relationship of plaintiffs' requested fees to the amount that Mr. Dodyk expected at that time would ultimately be distributed to the class. Mr. Dodyk endorsed the settlement on these terms to the Court.

13. Mr. Dodyk claims that plaintiffs counsel breached the Stipulation of Settlement in several ways (Dodyk Declaration ¶¶8-16). I will confine my declaration here to responding to the inaccurate accusation that we breached §6.1 of the stipulation that prevented plaintiffs from initiating communication with the class (Dodyk ¶10).

14. The Stipulation specified that plaintiffs were not to initiate any contact with the media, but it allowed plaintiffs' counsel to respond to questions raised by the media as long as the contact with the media is not initiated by plaintiffs' counsel. I specifically negotiated this provision with Mr. Dodyk, and declined to agree on behalf of plaintiffs to a gag order preventing plaintiffs' counsel from responding to inquiries made to them by the media.

15. As Mr. Goteiner states in his accompanying declaration, during the afternoon of January 31, Catherine Wilson, an Associated Press reporter, called Mr. Goteiner and left a message on his office phone mail in San Francisco asking him to call her to give her a comment about the settlement. Mr. Goteiner picked up the message from his phone mail in the Miami airport as we were waiting to board the plane to return to San Francisco. Mr. Goteiner returned the call from the phone booth in the airport.

16. The AP story then appeared which prompted Mr. Dodyk's call to me wherein he expressed his concern that we had violated the terms of the Stipulation. I had several telephone calls with Mr. Dodyk on this subject and had Mr. Goteiner participate in one of those calls. Mr. Goteiner related to Mr. Dodyk directly what had happened, specifically

that Ms. Wilson had initiated the phone call to him because an AP representative in the Courthouse had heard about the settlement. Mr. Goteiner offered to provide a sworn declaration to Mr. Dodyk as to what happened. I also related to Mr. Dodyk the recorded phone mail message from Ms. Wilson to Mr. Goteiner asking that Mr. Goteiner call her.

17. After Mr. Dodyk considered these facts, I am informed that he had Mr. Kaminsky and Mr. Bonner interview Ms. Wilson in Ms. Wilson's office. Mr. Dodyk later told me that he was satisfied that Mr. Goteiner had not violated the Stipulation in that he had not initiated the contact with Ms. Wilson. Because of this exchange, I was very surprised to read ¶ 10 of Mr. Dodyk's affidavit that as a result of Ms. Wilson's call to Mr. Goteiner that defendants "were confronted with a breach of 6.1 of the Stipulation . . ."

I declare under penalty of perjury that the foregoing is true and correct and that I could so competently testify if called upon to do so.

Executed at San Francisco, California, this 5th day of May, 1997.

s/ John Cooper
John Cooper

APPENDIX J — ADMINISTRATIVE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA CLOSING CASE DATED AND FILED MAY 8, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 90-6863-CIV-UNGARO-BENAGES

WILLIAM WATERS, LINDA BARTHOLOMEW, et al,

Plaintiffs,

vs.

INTERNATIONAL PRECIOUS METALS CORP., INC., et al.,

Defendants.

ADMINISTRATIVE ORDER CLOSING CASE

THIS CAUSE is before the Court upon a *sua sponte* examination of the file. It is hereby

ORDERED AND ADJUDGED that this case is CLOSED for administrative purposes. It is further

ORDERED AND ADJUDGED that all pending motions are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 8th day of May, 1997.

s/ Ursula Ungaro-Benages
URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE

APPENDIX K — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT RE MOTIONS DATED AND FILED NOVEMBER 4, 1998

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 97-5074

WILLIAM WATERS; LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated,

Plaintiffs-Appellees,

versus

INTERNATIONAL PRECIOUS METALS CORPORATION; MULTIVEST INCORPORATED; *ET AL.*,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

BEFORE: CARNES and HULL, Circuit Judges.

BY THE COURT:

Appellees' motion to strike Appellants' corrected brief dated October 13, 1998 and filed October 14, 1998 is GRANTED. This court, however, accepts Appellants' second corrected brief dated October 16, 1998.

Appellees' motion to withdraw its motion to clarify this court's October 6, 1998 order is GRANTED.

Appendix K

Appellees' motion for sanctions filed October 15, 1998 is DENIED. The Court reserves the right to impose sanctions on counsel for both sides should their conduct in the future not be more professional than it has been to this date.

Appellees' motion to supplement the record on appeal is CARRIED WITH THE CASE.

The motion filed by the American Association of Retired Persons ("AARP") for leave to file a brief as *amicus curiae* is GRANTED, PROVIDED all references in the brief to the survey attached as an addendum are deleted and a new brief devoid of those references is filed within seven days of the date of this order. No additional material should be added nor should any other changes be made in that brief.

AARP's motion for leave to file an addendum to its *amicus* brief is DENIED, because the survey is non-record material not presented in the district court. *See also Davis v. Monroe County Bd. of Education*, 120 F.3d 1390, 1410 (11th Cir. 1997) (Carnes, J., concurring) ("In general, we should be reluctant to incorporate into our reasoning the results of a survey that has not been examined critically or tested in a trial or evidentiary hearing, the time-honored and proven methods our system of justice uses to determine material facts."), *cert. granted*, 1998 WL 663332 (Sept. 29, 1998).

APPENDIX L — BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF APPELLEES DATED NOVEMBER 4, 1998

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-5074

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, INDIVIDUALLY AND AS TRUSTEE OF THE JASON GROSFELD TRUST, MULTIVEST REAL ESTATE, INC., S.S. MELBOURNE, INC., AND THE CYPRESS GROUP, INC.,

Appellants,

v.

WILLIAM WATERS AND LINDA BARTHOLOMEW, INDIVIDUALLY AND ON BEHALF OF ALL THOSE SIMILARLY SITUATED,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF APPELLEES

Deborah M. Zuckerman
AARP Foundation Litigation
601 E Street, N.W.
Washington, D.C. 20049
(202) 434-2060

Attorney for *Amicus Curiae*
American Association of Retired Persons

Appendix L

CERTIFICATE OF INTERESTED PERSONS

In accordance with F.R.A.P. 28 and Eleventh Circuit Rules 26.1-1, 26.1-2, 26.1-3, and 28-2(b), undersigned counsel for *Amicus Curiae* American Association of Retired Persons states that the following are interested persons and entities:

1. American Association of Retired Persons — *Amicus Curiae*

2. Gary S. Anderson — Counsel for Appellees/ Plaintiffs

3. Linda Bartholomew — Appellee/Plaintiff, Class Representative

4. R. Lawrence Bonner — Counsel for Appellants/ Defendants

5. Victor F. Caldwell — Counsel for Appellants/ Defendants

6. Justin Y.K. Chu — Counsel for Appellants/ Defendants

7. Certified Class of MultiVest Options, Inc. Customers — Appellees/Plaintiffs

8. John L. Cooper — Counsel for Appellees/Plaintiffs

9. Copart, Inc.

10. Cravath, Swaine & Moore — Counsel for Appellants/ Defendants

11. The Cypress Group, Inc. — Appellant/Defendant

12. Paul M. Dodyk — Counsel for Appellants/ Defendants

13. Farella Braun & Martel LLP — Counsel for Appellees/Plaintiffs

14. Neil A. Goteiner — Counsel for Appellees/Plaintiffs

15. James Grosfeld, individually and as Trustee of the Jason Grosfeld Trust — Appellant/Defendant

16. Nancy Grosfeld — Defendant in Conveyance Litigation below

17. Homer & Bonner, P.A. — Counsel for Appellants/ Defendants

18. Honigman, Miller, Schwarz & Cohn — Counsel for Corporate Defendants below

19. International Precious Metals Corporation — Appellant/Defendant

20. Robert M. Jackson — Counsel for Corporate Defendants below

21. Martin I. Kaminsky — Counsel for Appellants/ Defendants

22. Karen P. Kimmey — Counsel for Appellees/ Plaintiffs

23. Jeffrey R. Knight — Counsel for Appellants/ Defendants

24. Eric G. Lipoff — Counsel for Appellees/Plaintiffs

25. James J. Mangan — Counsel for Appellants/ Defendants

26. Edward T. McDermott — Counsel for Appellants/ Defendants

27. MultiVest, Inc. — Appellant/Defendant

28. MultiVest Real Estate, Inc. — Appellant/Defendant

29. Jeffrey P. Newman — Counsel for Appellees/ Plaintiffs

30. Pollack & Kaminsky — Counsel for Appellants/ Defendants

31. L. Louis Raring — Counsel for Appellees/Plaintiffs

32. Raring & Lipoff — Counsel for Appellees/Plaintiffs

33. Ronald B. Ravikoff — Local Counsel for Plaintiffs below

34. S.S. Melbourne, Inc. — Appellant/Defendant

35. Michael R. Siebecker — Counsel for Appellants/ Defendants

36. The Honorable Ursula Ungaro-Benages — Trial Judge below

37. Steven C. Wasinger — Counsel for Corporate Defendants below

38. William Waters — Appellee/Plaintiff, Class Representative

39. C. Brandon Wisoff — Counsel for Appellees/ Plaintiffs

40. Deborah M. Zuckerman — Attorney for *Amicus Curiae* American Association of Retired Persons

41. Zuckerman, Spaeder, Taylor & Evans — Local Counsel for Plaintiffs below.

CORPORATE DISCLOSURE STATEMENT

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) of the Internal Revenue Code and is exempt from income tax. AARP is also organized and operated as a non-profit corporation pursuant to the provisions of Title 29 of Chapter 6 of the District of Columbia Code.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is typed in 14 Point Times New Roman font.

Appendix L

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS .... [169a]

CORPORATE DISCLOSURE STATEMENT ..... [172a]

CERTIFICATE OF TYPE SIZE AND STYLE .... [172a]

TABLE OF CITATIONS ..... [175a]

STATEMENT OF INTEREST ..... [178a]

STATEMENT OF ISSUES ..... [179a]

SUMMARY OF ARGUMENT ..... [180a]

ARGUMENT ..... [181a]

I. TELEMARKETING FRAUD IS RAMPANT AND COSTLY. ..... [181a]

A. Legislators and Prosecutors Have Focused on This Problem ..... [181a]

B. Public Resources Are Inadequate to Prosecute Perpetrators ..... [184a]

II. THESE CASES ARE WELL-SUITED FOR CLASS ACTIONS ..... [186a]

A. Class Actions Are Designed for People with Relatively Small Claims Who Would Not Otherwise Have Legal Recourse ... [186a]

B. Enforcement Actions Rarely Obtain Restitution ..... [191a]

III. VICTIMS NEED ACCESS TO QUALIFIED ATTORNEYS ..... [193a]

A. Cases Are Complex, Time-Consuming, and Difficult to Prove ..... [193a]

B. Attorney Fees Should Be Based on the Total Common Fund ..... [194a]

CONCLUSION ..... [197a]

* * *

Appendix L

TABLE OF CITATIONS

CASES

Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) ..... [195a]

Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997) ..... [188a]

**Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980) .. .. [195a, 196a]

**Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768 (11th Cir. 1991) ..... [196a, 197a]

Central R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885) ..... [195a]

In re Continental Illinois Secs. Litig., 962 F.2d 566 (7th Cir. 1992) ..... [197a]

**Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326 (1980) ..... [188a]

Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968) .. [189a]

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) ..... [188a]

Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939) ..... [195a]

Appendix L

State v. Levi Strauss & Co., 715 P.2d 564 (Cal. 1986) ..... [190a]

Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261 (D.C. Cir. 1993) ..... [197a]

In re The Charter Co., 876 F.2d 866 (11th Cir. 1989) ..... [188a, 189a]

Trustees v. Greenough, 105 U.S. 527 (1881) ..... [195a]

Vasquez v. Superior Court of San Joaquin County, 484 P.2d 964 (Cal. 1971) ..... [189a]

Williams v. MGM-Pathe Communications Co., 129 F.3d 1026 (9th Cir. 1997) ..... [197a]

STATUTE

Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6101 et seq. (1996) ..... [181a, 190a]

LEGISLATIVE MATERIALS

The Nature and Extent of Telemarketing Fraud and Federal And State Law Enforcement Efforts to Combat It: Hearings Before the Commerce, Consumer, and Monetary Affairs Subcomm. of the House Comm. on Government Operations, 101st Cong. (1990) ..... [*passim*]

Appendix L

The Scourge of Telemarketing Fraud: What Can Be Done Against It?, H.R. Rep. No. 102-421 (1991) ..... [182a]

Telescams Exposed: How Telemarketers Target The Elderly: Hearing Before the Senate Special Comm. on Aging, 104th Sess. (1996) ..... [183a]

MISCELLANEOUS

Kaplan, *A Prefatory Note*, 10 B.C. Ind. & Com. L. Rev. 497 (1969) ..... [188a]

National Association of Consumer Advocates, *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, 176 F.R.D. 375 (1997) ..... [187a]

1 *Newberg on Class Actions* §§ 1.06, 5.07, 5.19, 5.48 (3d ed. 1992) ..... [187a, 195a]

United States-Canada Working Group, *United States-Canada Cooperation Against Cross-Border Telemarketing Fraud* (1997) ..... [181a]

Thomas E. Willging, et al., Federal Judicial Center, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (1996) ..... [187a]

Appendix L

STATEMENT OF INTEREST

The American Association of Retired Persons (AARP) is a non-profit membership organization dedicated to addressing the needs and interests of people 50 and older. Approximately 2.26 million of AARP's more than 30 million members live in Florida, with 770,000 in Georgia, and 378,000 in Alabama. As the largest membership organization serving older Americans, AARP is greatly concerned about the rampant fraud targeted against them through use of the telephone. Congress has estimated that fraudulent telemarketing costs consumers $40 billion annually, and research and law enforcement investigations indicate that scams specifically target older people.

AARP thus has made attacking this problem a top priority. AARP supports enactment and vigorous enforcement of federal and state laws and regulations designed to outlaw fraudulent and deceptive telemarketing sales and to provide adequate remedies for victims. Because research shows that consumers have great difficulty distinguishing between fraudulent and legitimate pitches, AARP undertook a major initiative to educate consumers about how to avoid telemarketing scams, and how to enforce their rights when they have been defrauded. This campaign is designed to counter victims' perception that fraudulent telemarketing is not a criminal activity.

In addition, AARP has been an active partner with state and federal law enforcement and consumer protection agencies, supporting the investigation and prosecution of fraudulent telemarketers. For example, in 1995, AARP

members became undercover witnesses for the FBI and attorneys general, tape recording conversations with suspected fraudulent telemarketers. The recordings became the foundation for "Operation Senior Sentinel" prosecutions, as they revealed the actual misrepresentations and deceptive pitches made to convince consumers to make purchases or otherwise send money.

Consumer education and prosecutions are inadequate, by themselves, to protect telemarketing fraud victims. Private litigation, particularly class actions, is a necessary complement to these other activities and, in fact, hold more promise of providing relief for victims. AARP is filing this *amicus* brief due to its concern that this critical avenue of redress will be severely limited if Appellants succeed in undoing a negotiated settlement that created a common fund and provided for attorneys' fees as a percentage of the total fund.

STATEMENT OF ISSUES

1. Did the district court err in basing counsel's fee on the total settlement fund, where to do otherwise would violate Supreme Court precedent and limit the ability of telemarketing fraud victims to retain attorneys qualified to file class actions challenging hard-to-prove schemes involving numerous deceptive transactions?

2. Did counsel confer a substantial benefit on the class of victims of a telemarketing commodities scheme by creating a settlement fund of $40 million which produced, after the lower court awarded attorneys' fees and expenses,

a recovery of 20% of each victim's loss (an average of $1,200 per victim)?

3. Should this Court reform a settlement agreement to rescind that part of the agreement in which defendants expressly agreed not to object to counsel's fees, where such action would discourage class action settlements and make counsel reluctant to represent a class of telemarketing fraud victims?

SUMMARY OF ARGUMENT

Numerous legislators, law enforcement officials, consumer advocates, and others recognize that telemarketing fraud is a serious national problem, costing an estimated $40 billion a year. Law enforcement and regulatory officials also have identified telemarketing fraud involving commodities and other investments as particularly serious. They admit, however, that federal and state resources are insufficient to attack the problem. And, even when they successfully prosecute wrongdoers, they rarely obtain restitution for victims.

Private litigation thus remains the only real option for victims. Yet, many of their individual losses are too small to justify the expenditures necessary to hire a lawyer. Class actions were intended for just these situations, and are critical in allowing victims to vindicate their rights and recover at least a portion of their losses. This avenue of redress will remain an illusion, however, unless lawyers qualified to mount a complex telemarketing fraud case can expect to receive reasonable compensation. When their efforts produce

a common fund for the class, as occurred here, the U.S. Supreme Court has held that their fees should be based on the total fund created, not merely the claims filed by class members. Appellants should not be allowed to ignore this clear precedent by avoiding the terms of a negotiated settlement regarding fees. Their actions will, if successful, permit them to benefit further from their wrongdoing and will deny their victims any realistic chance of bringing a court action to recover their losses.

ARGUMENT

I. TELEMARKETING FRAUD IS RAMPANT AND COSTLY.

A. Legislators and Prosecutors Have Focused on This Problem.

Telemarketing fraud is "one of the most pervasive forms of white-collar crime" in the United States. United States-Canada Working Group, *United States-Canada Cooperation Against Cross-Border Telemarketing Fraud*, Executive Summary (1997). Congress enacted the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6101 et seq. (1996), after finding that victims lose an estimated $40 billion a year, and that the Federal Trade Commission's resources were insufficient to protect consumers. *Id.* at §§ 6101(2), 6101(3).

Various congressional committees and subcommittees have held hearings on this issue. Describing his reaction to the briefing materials for one hearing, a Congressman stated:

Appendix L

"I was stunned to learn how seemingly impervious many of these telemarketing and boiler room practices are to effective criminal prosecution. These guys are like termites. Once they are in business, you can't seem to get rid of them." *The Nature and Extent of Telemarketing Fraud and Federal And State Law Enforcement Efforts to Combat It: Hearings Before the Commerce, Consumer, and Monetary Affairs Subcomm. of the House Comm. on Government Operations*, 101st Cong. 3 (1990)[1] [hereinafter *House Hearings*] (opening statement of Rep. J. Dennis Hastert). He noted that older people often lose their life savings, and that "[v]ery rarely are these funds ever recovered, even when there is prosecution." *Id.* Another subcommittee member characterized telemarketing fraud as a "devastating crime, robbing unsuspecting victims, not only of their money but of their self-esteem and their financial independence." *Id.* at 4 (opening statement of Rep. Frank Horton).

An 84-year-old Georgia widow poignantly supported the Congressmen's observations. She lost $20,000, the entire legacy left to her by her husband and their entire life savings, in an investment scam in which she was assured she "absolutely would receive 2-1/2 times the amount of [her] investment." *Id.* at 11 (testimony of Grace L. Singletary). She also stated that she had spent many years as a schoolteacher and thought of herself as an intelligent person, but that the caller sounded like someone she could trust and his persuasive manner convinced her. She described her constant worry about "a future without any savings," and

1. Congressional findings and recommendations based on this two-day hearing are found in *The Scourge of Telemarketing Fraud: What Can Be Done Against It?*, H.R. Rep. No. 102-421 (1991).

asked the subcommittee "to stop this kind of sophisticated thievery." *Id.* at 14, 15.

The testimony is replete with examples of similar horror stories. An attorney who had helped a 90-year-old woman recover some of the money she lost to a foreign currency and precious metals scam testified that what was most incredible was that "well over $300,000 was taken from [her] in commissions." *Id.* at 43 (statement of Christopher D'Amanda).

Similar sentiment and examples surfaced at a more recent Senate hearing. Former Senator and Committee Chairman William Cohen stated:

> Telemarketing scams . . . run the gamut from small fly-by-night operators to sophisticated organized crime rings that establish boiler rooms in several cities. Whatever their size, these telephone thugs share the common motto of "reach out and scam someone," using high pressure sales tactics and slick talk to lure their victims into sending them hundreds — indeed, even thousands — of dollars.

Telescams Exposed: How Telemarketers Target The Elderly: Hearing Before the Senate Special Comm. on Aging, 104th Sess. 1 (1996) [hereinafter *Senate Hearing*] (opening statement of Sen. William Cohen). He noted that tape recordings and transcripts of calls obtained during "Senior Sentinel" revealed "how unscrupulous callers engage in what amounts to 'teleterrorism' by verbally abusing, insulting and berating senior citizens . . . ." *Id.* at 2.

Witnesses also described the techniques used to separate victims from their money. For example, a convicted telemarketer facing sentencing stated that "people . . . were hired to write elaborate pitches making promises for huge returns and the safety of the market, when in fact everyone knew that it was not an investment market that offered any legitimacy to the client." *House Hearings*, *supra*, at 74 (statement of John Albright[2]). He also stated that investment pitches are designed to fit the victim's level of sophistication: "[T]he unsophisticated investor, you would treat as if he were sophisticated so that you would talk over his head and absolutely bury him with doubletalk." *Id.* at 129.

B. Public Resources Are Inadequate to Prosecute Perpetrators.

Several witnesses from law enforcement agencies told Congress about the enormous obstacles they face in prosecuting fraudulent telemarketers, a situation that is well-known to scam artists. The interstate nature of many telemarketing scams contributes to this problem, because agencies are less apt to bring a case against an in-state operator if the victims live elsewhere. A convicted telemarketer's testimony is very telling:

> One of the things that is usually done is never to sell in your own back yard . . . . By and large, the [prosecutorial] agencies don't have the manpower or the budget requirements to deal with this and

---

2. Cooperating with the government, this witness testified under an assumed name.

> the local politicians, because there are no constituents to complain to them, are not inclined to finance these kind of investigations.

House Hearings, *supra*, at 77-78 (statement of John Albright).

The Chief of the Economic Crime Unit in the Florida State Attorney's Office stated: "it is obvious that limited resources already strained to the breaking point in areas of boiler room concentration, such as South Florida, are inadequate to deal with a problem which is nationwide in its effect." *Id.* at 163 (statement of Kent C. Neal). He also discussed the need for more money to pursue criminal enforcement, as opposed to regulation:

> career phone crooks typically welcome administrative actions and scoff at their potential sanctions. For one thing the interest of a state or federal regulatory agency reassures them that criminal charges are unlikely . . . . In addition, the time required to litigate the administrative and civil actions commonly pursued, merely buys them time to shut down, re-incorporate, and relocate their boiler rooms. It all amounts to a cost of doing business, and a small one compared to the enormous illegal profits involved.

Id. at 168.

A former Assistant U.S. Attorney who headed the southern California Fraud Task Force echoed this view:

> so many good cases where suspects should have been punished and where millions could have been recovered for victims went unindicted for lack of a few thousand dollars . . . . The lack of resources to combat scams involving *investments* has been a particular tragedy . . . . [A]s I testify today thousands of Southern California swindlers are acting with virtual impunity as they devise and carry out heartless schemes to separate elderly persons from their life savings . . . . The vast majority of the operators of these scams have never been and will never be prosecuted at all, because of a failure to commit the level of resources required to combat the problem.

Id. at 226-27 (statement of David A. Katz).

The dearth of public resources available to attack telemarketing fraud stands in stark contrast to the cost to victims, in terms of their financial, physical and emotional well-being. As discussed more fully below, class actions remain one of the only avenues of legal recourse open to them.

II. THESE CASES ARE WELL-SUITED FOR CLASS ACTIONS.

A. Class Actions Are Designed for People with Relatively Small Claims Who Would Not Otherwise Have Legal Recourse.

Consumer class actions often are the only effective way to stop wrongful business conduct and to obtain relief for

those harmed in the process. *See* National Association of Consumer Advocates, *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, 176 F.R.D. 375, 377-78 (1997). *See also* 1 *Newberg on Class Actions* §§ 1.06, 5.07, 5.48 (3d ed. 1992). Certain types of businesses typically deal with numerous consumers in similar ways, and many consumers are harmed by the same wrongful conduct. Yet, these businesses are essentially immune from individual damage suits because any individual recovery will be too small to justify the cost of litigation. This allows the business to profit from its wrongdoing, both financially and by not having its conduct scrutinized by the justice system. Fortunately for the consuming public, class actions "aggregate [consumers] power, enable them to take on economically-powerful institutions, and make wrongful conduct less profitable." *NACA Guidelines*, *supra*, at 377. *See also* Thomas E. Willging, et al., Federal Judicial Center, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisor Committee on Civil Rules*[3] 13-14 (1996) ("even the highest level of recovery per individual class member that we found appears unlikely to support separate individual actions . . . .").

The U.S. Supreme Court has endorsed this important role of class actions:

---

3. The Federal Judicial Center conducted this study in 1994-95 pursuant to a request from the Judicial Conference Advisory Committee on Civil Rules for systematic, empirical information about how Rule 23 operates. The Report presents empirical data on all class actions terminated between July 1, 1992 and June 30, 1994 in the Southern District of Florida, the Northern District of California, the Eastern District of Pennsylvania, and the Northern District of Illinois.

Appendix L

> The use of the class-action procedure for litigation of individual claims may offer substantial advantages for named plaintiffs; it may motivate them to bring cases that for economic reasons might not be brought otherwise . . . . The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.

Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 338-39 (1980) (footnote deleted).

The Supreme Court recently reiterated this view: "While the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.' " *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2246 (1997) (quoting Kaplan, *A Prefatory Note*, 10 B.C. Ind. & Com. L. Rev. 497 (1969)). *See also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985).

This Court recognized the class action "goal of permitting the prosecution of small claims which would not be economical to prosecute individually." *In re The Charter Co.*, 876 F.2d 866, 871 (11th Cir. 1989). Moreover,

> [b]ecause claims may be contingent or of uncertain value, potential claimants may not realize that they can recover, unless the efforts of a representative make them aware. Likewise, the effort and cost of investigating and initiating a claim may be greater than many claimants' individual stake in the outcome, discouraging the prosecution of these claims absent a class action filing procedure.

Id. (citation omitted). *See also Green v. Wolf Corp.*, 406 F.2d 291, 296 (2d Cir. 1968).

State courts also hold this view. For example, the California Supreme Court noted the historical and continued underpinnings of class actions, and stated that:

> Protection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society . . . . The alternatives of multiple litigation . . . do not sufficiently protect the consumer's rights because these devices "presuppose 'a group of economically powerful parties who are obviously able and willing to take care of their own interests individually through individual suits or individual decisions about joinder or intervention.' "

Vasquez v. Superior Court of San Joaquin County, 484 P.2d 964, 968 (Cal. 1971) (citations omitted).

While the losses suffered by Appellees and most other telemarketing fraud victims are significant to them, they are

small in comparison to the costs of suing for restitution. The importance of class actions in this context is particularly great, as demonstrated by congressional witnesses who cited small individual losses as a disincentive to prosecution. The Deputy Assistant Director of the FBI stated: "FBI offices . . . are inundated with complaints involving these types of frauds. Due to the limited investigative and prosecutive resources available, only those cases which involve extremely large losses to investors are able to be addressed." *House Hearings*, *supra*, at 551 (statement of Thomas Jones).

The Executive Director of the National Consumers League stated that if victims contact an agency "like the Federal Trade Commission,[4] the Securities and Exchange Commission, or Commodity Futures Trading Commission, they find those agencies usually cannot help them because their loss does not merit dedication of the agency's finite resources." *Id.* at 275-76 (statement of Linda Golodner).

These witnesses reflect the only logical conclusion that can be drawn from this commentary and testimony, namely, that private class actions remain the only realistic way for telemarketing fraud victims to seek restitution, and to ensure that bad actors cannot "retain ill gotten gains simply because their conduct harmed large numbers of people in small amounts instead of small numbers of people in large amounts." *State v. Levi Strauss & Co.*, 715 P.2d 564, 571 (Cal. 1986).

---

4. Federal law allows individuals to bring a civil action in federal district court to challenge a violation of the FTC's Telemarketing Sales Rule, but only when "the amount in controversy exceeds the sum or value of $50,000 in actual damages for each person adversely affected by such telemarketing." 15 U.S.C. § 6104(a).

Appendix L

B. Enforcement Actions Rarely Obtain Restitution.

Successful prosecutions of fraudulent telemarketers seldom achieve any direct, i.e., monetary, benefit for victims. Congressional witnesses, including people who commit this fraud and those responsible for stopping them, expressed the problem best. For example, a convicted telemarketer stated:

> when a federal regulatory agency gets involved and shuts down a fraudulent telemarketing room, the resources that are frozen are turned over to a receiver and those assets are dissipated in total, with none of them ever being used to combat the telemarketing problem or to provide restitution to the victims.

House Hearings, *supra*, at 79 (statement of John Albright).

In response to a Congressman's question about the award of civil penalties to the government, Lawrence Fuchs, Florida's Deputy Comptroller, described the prosecution of an investment scam with losses totaling $21 million. The perpetrator pled guilty, went to prison, and also filed for bankruptcy. As a result, "the $11 million or so that we have been able to recover which would have given [victims] between a third and a half of their investment back, then went into the hands of the trustee of the bankruptcy court." *Id.* at 495. Responding to a question about potential legislation requiring asset forfeiture, William McDonald, Director of California's Department of Corporations, and Chair of the Enforcement Policy Committee of the North American Securities Administrators Association, stated:

> The difficulty . . . is that you have a body of victims out there who lost a lot of money, and if there is some money in the hands of promoters, it is awfully difficult to say we are going to seize it to put into the law enforcement side and not give any of it back to the poor victims . . . .
>
> We can get civil penalties and criminal fines, but usually there is so little cash around because it has gone offshore or been hidden, and it is usually difficult to grab any of it.

Id. at 502.

The U.S. Attorney for Nevada expressed similar sentiments:

> Telemarketing sales presentations are really [ ] carefully scripted pitches designed to trap the unwary, to close a sale by whatever means necessary. Telemarketers get paid generous commissions, living by the proposition that whatever brings profit is permissible . . . . Yet often when these con artists are brought to justice, it is impossible to recover anything to compensate their victims because most of their money has gone to purchase illegal drugs or to support an extravagant lifestyle.

Senate Hearing, *supra*, at 60 (statement of Kathryn Landreth).

While class actions thus hold great promise for making the rights of telemarketing fraud victims a reality, it will be an empty promise unless the private bar is willing to overcome the considerable odds that favor the scam artists.

III. VICTIMS NEED ACCESS TO QUALIFIED ATTORNEYS.

A. Cases Are Complex, Time-Consuming, and Difficult to Prove.

Congressional witnesses, particularly law enforcement officials, cited the nature of telemarketing fraud as yet another hurdle to successful prosecution. Of particular relevance to this appeal, the then-Chairman of the Commodity Futures Trading Commission said the following in providing supplemental information at the request of the subcommittee Chair: "criminal prosecutors have not brought a large number of cases in the futures and options fraud area . . . . [These] often involve complex legal and factual issues unfamiliar to most prosecuting attorneys." *House Hearings*, *supra*, at 791 (letter from Wendy L. Gramm).

A former U.S. Attorney who had coordinated the Southern California Fraud Task Force compared investment and telemarketing fraud to other complex white-collar crimes, noting that "complex major cases required more than one agent at a time, an agency commitment over time and a level of experience and accounting and telemarketing background that many investigators had not developed." *Id.* at 225 (testimony of David A. Katz).

Perhaps the vice-president of a small family business that lost more than $100,000 to a telemarketing fraud involving office products summed it up best:

> Prosecuting fraud cases is not an easy task. In these types of cases it boils down to he said-she said. Solid proofs are rare. The mechanics alone are a nightmare. Imagine the complexity of preparing and assembling witnesses from all over the country. When the witnesses do finally appear, the defense asks for a seven day extension and prosecution spends the next week acting as a travel agent instead of preparing the case.

Id. at 41 (statement of Orlo Ellison).

These difficulties underscore the need for committed, motivated private attorneys to step up to the plate to represent telemarketing fraud victims.

B. Attorney Fees Should Be Based on the Total Common Fund.

After describing the fraudulent telemarketing of commodities and other investments to "victims who are unsophisticated," the Director of the Enforcement Division of California's Department of Corporations stated: "[t]he last advantage of the con men is that the victims are not out enough money to afford to hire a lawyer." *Id.* at 468 (testimony of William McDonald). Class actions, however, allow the sharing of expenses, and counsel frequently advance litigation costs with the expectation they will be

reimbursed and receive reasonable fees if the suit succeeds. *See* 1 *Newberg on Class Actions* § 5.19 (3d ed. 1992).

While the "American Rule" makes parties responsible for their own attorneys' fees, regardless of the outcome of the case, *see Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975), courts recognize exceptions to this approach. The common fund exception at issue in this appeal was created by the U.S. Supreme Court more than a century ago, in *Trustees v. Greenough*, 105 U.S. 527 (1881), to allow an equity court to reimburse a litigant whose efforts on his own behalf created a benefit for others. This helps ensure that the high cost of litigation will not deter individual class members from pursuing meritorious cases, and prevents unjust enrichment of class members who do not play an active role in the litigation. *Id.* at 532.

The Supreme Court has extended the effect of this exception, approving the reimbursement of attorneys from a common fund. *See Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885); and *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939). Reliance on these principles led to a perhaps inevitable question: how should such fees be calculated? In *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980), the Supreme Court responded quite clearly, holding that counsel's fees are to be based on the entire fund, since the right of absentee class members to

> share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel. Unless

> absentees contribute to the payment of attorney's fees incurred on their behalves, they will pay nothing for the creation of the fund and their representatives may bear additional costs.

Id. at 480.

Boeing involved circumstances strikingly similar to this appeal (i.e., each class member had an undisputed, mathematically ascertainable claim to part of a lump sum, and class members need only prove membership in the injured class to claim that share), except that the liability and fund created here was pursuant to a negotiated settlement, rather than a court determination. This distinction does not diminish the applicability of the *Boeing* Court's affirmance of the Second Circuit's finding that "each class member had a 'present vested interest in the class recovery' and that each could collect his share of the judgment upon request. Thus . . . absentee class members had received a benefit within the meaning of the common-fund doctrine." *Id.* at 478.

This Court, noting that "every Supreme Court case addressing the computation of a common fund fee award has determined such fees on a percentage of the fund basis," found "the percentage of the fund approach is the better reasoned . . . ." *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768, 773, 774 (11th Cir. 1991). Recognizing that "no hard and fast rule mandat[es] a certain percentage . . . because the amount of any fee must be determined upon the facts of each case," this Court noted that the "majority of common fund fee awards fall between 20% to 30% of the fund [and] an upper limit of 50% of the fund may be stated

as a general rule." *Id.* at 774-75. Other federal courts follow this approach, as well. For example, the Ninth Circuit found that the lower court had abused its discretion by basing a fee award on class members' claims. *Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026 (9th Cir. 1997). The Court noted that the Supreme Court has recognized the propriety of parties to a class action negotiating a settlement, as well as the payment of attorneys' fees. "The Defendants here knew, because it was in the settlement agreement, that the class attorneys would seek to recover fees based on the entire $4.5 million fund .... The Defendants had some responsibility to negotiate at the outset for a smaller settlement fund if they wished to limit fees." *Id.* at 1027. *See also Swedish Hosp. Corp. v. Shalala*, I F.3d 1261, 1269 (D.C. Cir. 1993) ("a percentage-of-the-fund approach more accurately reflects the economics of litigation practice"); and *In re Continental Illinois Secs. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) ("the object is to simulate the market where a direct market determination is infeasible. It is infeasible in a class action because no member of the class has a sufficient stake to drive a hard — or any — bargain with the lawyer .... [C]ounsel are entitled to the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client.").

CONCLUSION

Criminal and civil prosecutions are effective in shutting down and punishing fraudulent telemarketers. Yet, these actions are only part of the arsenal necessary to combat this widespread problem. Not only do federal and state agencies have limited resources, they also have many competing

priorities. Also, while these prosecutions may close down a fraudulent operation and result in imprisonment and the payment of civil penalties, they rarely secure restitution for victims.

This underscores the need for private lawsuits through which victims can seek redress. While some telemarketing fraud victims lose tens of thousands of dollars, many lose much smaller amounts, making it uneconomical for them to bring individual lawsuits. Class actions therefore must be available to victims and, to make this avenue of redress a reality, the prospect of an award of reasonable fees must exist to encourage competent attorneys to handle these difficult, time-consuming cases. Where counsel's efforts create a common fund for class members, these fees should be based on the total fund, not merely the claims made against the fund. To hold otherwise ignores Supreme Court precedent and will seriously affect victims' ability to enforce their rights and obtain restitution.

For all of the foregoing reasons, *amicus curiae* respectfully request that this Court reject Appellants' attempt to renege on the attorneys' fee portion of the negotiated settlement to which they agreed.

Appendix L

Dated: November 4, 1998

Respectfully submitted,

s/ Deborah M. Zuckerman
Deborah M. Zuckerman
AARP Foundation Litigation
Counsel for *Amicus Curiae*
American Association of
Retired Persons
601 E Street, N.W.
Washington, D.C. 20049
(202) 434-2060

APPENDIX M — BRIEF FOR PLAINTIFFS-APPELLEES DATED OCTOBER 20, 1998, CORRECTED NOVEMBER 2, 1998

No. 97-5074

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

WILLIAM WATERS AND LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated,

Plaintiffs-Appellees,

vs.

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, Individually and as Trustee of the Jason Grosfeld Trust, MULTIVEST REAL ESTATE, INC., S.S. MELBOURNE, INC., and THE CYPRESS GROUP, INC.,

Defendants-Appellants.

On Appeal From The United States District Court
For The Southern District of Florida

BRIEF FOR PLAINTIFFS-APPELLEES

Appendix M

NEIL A. GOTEINER
GARY S. ANDERSON
C. BRANDON WISOFF
KAREN P. KIMMEY
FARELLA BRAUN & MARTEL LLP
235 Montgomery Street
San Francisco, CA 94104
Telephone: (415) 954-4400

ERIC G. LIPOFF
RARING & LIPOFF
3070 Bristol, Suite 650
Costa Mesa, CA 92626-3072
Telephone: (714) 429-2970

Attorneys for Plaintiffs and Appellees
WILLIAM WATERS and LINDA BARTHOLOMEW
and those similarly situated

October 20, 1998 (Corrected as of November 2, 1998.)

Appendix M

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with F.R.A.P. 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2, 26.1-3, and 27-1, undersigned, counsel state that the following are interested persons and entities:

Gary S. Anderson (Counsel for Appellees/Plaintiffs)

Linda Bartholomew (Appellee/Plaintiff, Class Representative)

R. Lawrence Bonner (Counsel for Appellants/Defendants)

Victor F. Caldwell (Counsel for Appellants/Defendants)

Justin Y.K. Chu (Counsel for Appellants/Defendants)

Certified Class of MultiVest Options, Inc. for Customers (Appellees/Plaintiffs)

John L. Cooper (Counsel for Appellees/Plaintiffs)

Copart, Inc.

Cravath, Swaine & Moore (Counsel for Appellants/ Defendants)

The Cypress Group, Inc. (Appellant/Defendant)

Paul M. Dodyk (Counsel for Appellants/Defendants)

Farella Braun & Martel LLP (Counsel for Appellees/ Plaintiffs)

Appendix M

Neil A. Goteiner (Counsel for Appellees/Plaintiffs)

James Grosfeld, individually and as Trustee of the Jason Grosfeld Trust (Appellant/Defendant)

Nancy Grosfeld (Defendant in Conveyance Litigation below)

Homer & Bonner (Counsel for Appellants/Defendants)

Honigman, Miller, Schwartz & Cohn (Counsel for Corporate Defendants below)

International Precious Metals Corporation (Appellant/ Defendant)

Robert M. Jackson (Counsel for Corporate Defendants below)

Martin I. Kaminsky (Counsel for Appellants/Defendants)

Karen P. Kimmey (Counsel for Appellees/Plaintiffs)

Jeffery R. Knight (Counsel for Appellants/Defendants)

Eric G. Lipoff (Counsel for Appellees/Plaintiffs)

Edward T. McDermott (Counsel for Appellants/Defendants)

MultiVest, Inc. (Appellant/Defendant)

MultiVest Real Estate, Inc. (Appellant/Defendant)

Appendix M

Jeffrey P. Newman (Counsel for Appellees/Plaintiffs)

Pollack & Kaminsky (Counsel for Appellants/Defendants)

L. Louis Raring (Counsel for Appellees/Plaintiffs)

Raring & Lipoff (Counsel for Appellees/Plaintiffs)

S.S. Melbourne, Inc. (Appellant/Defendant)

Michael R. Siebecker (Counsel for Appellants/Defendants)

The Honorable Ursula Ungaro-Benages (Trial Judge below)

Steven C. Wasinger (Counsel for Corporate Defendants below)

William Waters (Appellee/Plaintiff, Class Representative)

C. Brandon Wisoff (Counsel for Appellees/Plaintiffs)

STATEMENT REGARDING ORAL ARGUMENT PURSUANT TO LOCAL RULE 28-2(c)

Plaintiffs believe oral argument is unnecessary.

CERTIFICATE OF TYPE SIZE AND STYLE

The text of this Brief For Plaintiffs-Appellees was typed in 11.5 point Times Roman, and the footnotes were typed in 11 point Times Roman.

Appendix M

Table of Contents

Statement Regarding Oral Argument Pursuant To Local Rule 28-2(C) ..... [204a]

Certificate Of Type Size And Style ..... [204a]

Table Of Authorities ..... [208a]

Statement Of Jurisdiction ..... [216a]

Statement Of Issues On Appeal ..... [217a]

Standard Of Review ..... [219a]

Statement Of The Case ..... [219a]

Statement of Facts ..... [225a]

1. Grosfeld's Companies and the Genesis of this Class Action ..... [225a]

2. The Proceedings Through Trial ..... [227a]

3. The Settlement Negotiations ..... [238a]

   a. Early Unsuccessful Negotiations ..... [238a]

   b. Final Negotiations ..... [239a]

4. Preliminary Approval of the Settlement and Dismissal of the Jury ..... [243a]

5. Defendants' Breaches and the District Court's Fairness Hearings ..... [246a]

Summary Of Argument ..... [257a]

Argument ..... [258a]

I. THE COURT SHOULD NOT PERMIT DEFENDANTS TO CONTEST THEIR OWN SETTLEMENT ..... [258a]

II. THE FEE AWARD WAS AN APPROPRIATE EXERCISE OF THE DISTRICT COURT'S DISCRETION ..... [261a]

A. District Courts Have Broad Discretion In Determining The Reasonableness Of Class Action Fee Awards ..... [261a]

B. An Unbroken Line Of Authority Holds That The Fee Properly May Be Based On The Gross Amount Of The Settlement Fund ..... [262a]

C. The Settlement And Fee Agreement Were The Result Of Arms-Length Bargaining; Defendants' Mischaracterize The Process And Offer Only Speculative Hypotheticals With No Support In The Record ..... [269a]

D. No Case Has Ever Suggested, Let Alone Held, That The Fee Must Be Limited To A Percentage Of The Actual Claims ... [275a]

E. No Case Has Ever Permitted A Party To Benefit From A Breach Of His Fee Agreement; Fundamental Contract Principles Prohibit Such A Result ..... [278a]

F. Defendants' "Clear Sailing" Cases Do Not Permit Them To Appeal From Their Express Agreement ..... [281a]

G. The District Court Properly Applied *Camden* ..... [286a]

III. THE EXPENSE AWARD WAS ALSO APPROPRIATE ..... [290a]

IV. THE FEE AND EXPENSE AWARD IS ASSIGNABLE AS A MATTER OF LAW .. [291a]

CONCLUSION ..... [293a]

Appendix M

Table of Authorities

Page

FEDERAL CASES

Apache Trading Corp. v. Toub,
816 F.2d 605 (11th Cir. 1987) ..... [237a]

Beecher v. Able,
575 F.2d 1010 (2d Cir. 1978) ..... [280a]

Bennett v. Behring Corp.,
737 F.2d 982 (11th Cir. 1984) ..... [262a, 263a, 264a,
..... 265a, 266a, 267a, 268a, 269a, 275a, 277a]

**Boeing Co. v. Van Gemert*,
444 U.S. 472 (1980) ..... [passim]

Bowling v. Pfizer, Inc.,
927 F. Supp. 1036 (S.D. Ohio 1996) ..... [277a]

**Camden I Condominium Association, Inc. v. Dunkle*,
946 F.2d 768 (11th Cir. 1991) ..... [passim]

Clayton Brokerage Co. v. CFTC,
794 F.2d 573 (11th Cir. 1986) ..... [236a]

Commodity Futures Trading Commission v. Weintraub,
471 U.S. 343 (1985) ..... [227a]

Appendix M

**In re Copley Pharmaceutical, Inc. "Albuterol" Products Liability Litig.*, 1 F. Supp. 2d 1407 (D. Wyo. 1998) ..... [279a]

In re Crazy Eddie Secs. Litig., 824 F. Supp. 320 (E.D.N.Y. 1993) ..... [270a, 290a]

DAmato v. Hermanson, 153 F.3d 464 (7th Cir. 1998) ..... [222a]

Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993) ..... [237a]

Dean Witter Reynolds, Inc. v. Fernandez, 741 F.2d 355 (11th Cir. 1984) ..... [259a]

In re Domestic Air Transport Antitrust Litig., 148 F.R.D. 297 (N.D. Ga. 1993) ..... [275a]

Duhiame v. John Hancock Mutual Life Ins. Co., 989 F. Supp. 375 (D. Mass. 1997) ..... [276a, 284a]

**Evans v. Jeff D.*, 475 U.S. 717 (1986) ..... [274a, 280a, 283a]

**Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987) ..... [216a, 259a]

In re Hayes, 168 B.R. 717 (Bankr. D. Kan. 1994) ..... [292a]

Appendix M

Hibiscus Assocs., Ltd. v. Board of Trustees of Policemen and Firemen Retirement Sys., 50 F.3d 908 (11th Cir. 1995) ..... [280a]

Holmes v. Continental Can Co., 706 F.2d 1144 (11th Cir. 1983) ..... [262a]

**Johnson v. Georgia Highway Express Inc.*, 488 F.2d 714 (5th Cir. 1974) ..[221a, 261a, 264a, 286a]

Johnston v. Comerica Mortgage Co., 83 F.3d 241 (8th Cir. 1996) ..... [287a]

Kelly v. Carr, 442 F. Supp. 346 (W.D. Mich. 1977) *aff'd in part, rev'd in part on other grounds*, 691 F.2d 800 (6th Cir. 1980) ..... [236a]

Kelly v. Carr, 567 F. Supp. 831 (W.D. Mich. 1983) ..... [236a]

Koppel v. Wein, 743 F.2d 129 (2d Cir. 1984) ..... [269a]

Leverso v. SouthTrust Bank of Ala. Nat. Assoc., 18 F.3d 1527 (11th Cir. 1994) ..... [280a]

Lyons v. Scitex Corp., 987 F. Supp. 271 (S.D.N.Y. 1997) ..... [277a]

Magicsilk Corp. v. Vinson, 924 F.2d 123 (7th Cir. 1991) ..... [260a]

Appendix M

Malchman v. Davis,
761 F.2d 893 (2d Cir. 1985) ..... [274a, 282a, 283a]

Markow v. Alcock,
356 F.2d 194 (5th Cir. 1966) ..... [260a]

Parker v. Anderson,
667 F.2d 1204 (5th Cir. 1982) ..... [261a]

Prandini v. National Tea Co.,
557 F.2d 1015 (3rd Cir. 1977) ..... [282a, 283a]

In re Prudential Ins. Co. of America Sales Litig.,
962 F. Supp. 572 (D.N.J. 1997)
aff'd in part, vacated in part 148 F.3d
283 (1998) ..... [276a]

In re Prudential Ins. Co. of America Sales Litig.,
148 F.3d 283 (3d Cir. 1998) ..... [276a, 287a]

Rolo v. City Investing Co. Liquidating Trust, 1998
WL 547050 (3d Cir. 1998) ..... [222a]

Rosenfeld v. Collins & Aikman Corp., 1989 WL
150926 at *3 n.14; (E.D. Pa. 1989) ..... [269a]

Six Mexican Workers v. Arizona Citrus Growers,
904 F.2d 1301 (9th Cir. 1990) ..... [289a]

**Skelton v. General Motors Corp.*,
860 F.2d 250 (7th Cir. 1988) ..[264a, 269a, 270a, 288a]

Appendix M

**In re Southeast Banking Corp. Securities Litig.*,
51 F.3d 1003 (11th Cir. 1995) ..... [216a, 259a]

Strong v. Bell South Telecommunications, Inc.,
137 F.3d 844 (5th Cir. 1998) ..... [275a]

In re Texaco, Inc.,
90 Bankr. 622 (Bankr. S.D.N.Y. 1988) ..... [284a]

United States v. Brien,
617 F.2d 299 (1st Cir. 1980) ..... [236a]

**Van Gemert v. Boeing Co.*, 590 F.2d 433
(2d Cir. 1978) ..... [266a, 267a, 268a]

Van Gemert v. Boeing Co.,
553 F.2d 812 (2d Cir. 1977) ..... [270a]

Van Gemert v. Boeing Co.,
573 F.2d 733 (2d Cir. 1978) ..... [266a]

Van Gemert v. Boeing Co.,
739 F.2d 730 (2d Cir. 1984) ..... [270a]

*Washington Gas Light Co. v. Virginia
Electric & Power Co.*, 438 F.2d 248
(4th Cir. 1971) ..... [259a]

Waters v. International Precious Metals Corp.,
172 F.R.D. 479 (S.D. Fla. 1996) ..... [228a]

Weinberger v. Great Northern Nekoosa Corp.,
925 F.2d 518 (1st Cir. 1991) ..... [281a, 282a, 283a]

Appendix M

**Williams v. MGM-Pathe Communications Co.*,
129 F.3d 1026 (9th Cir. 1997) ..... [268a, 279a]

Wise v. Popoff,
835 F. Supp. 977 (E.D. Mich. 1993) ..... [276a, 277a]

STATE CASES

City of Ozark v. Trawick,
604 So. 2d 360 (Ala. 1992) ..... [269a]

Classic Concepts, Inc. v. Poland,
570 So. 2d 311 (Fla. 4th DCA 1990) ..... [291a]

Cordis Corp. v. Sonics Int'l, Inc.,
427 So. 2d 782 (Fla. DCA 1983) ..... [291a]

Florida First Nat'l Bank at Key West v. Fryd Constr. Corp., 245 So. 2d 883
(Fla. 3d DCA 1970) ..... [291a]

Goodrich v. E.F. Hutton Group Inc., 1996
WL 76161 (Del. Ch. 1996) ..... [277a]

Goodrich v. E.F. Hutton Group Inc.,
681 A.2d 1039 (Del. 1996) ..... [278a]

L.V. McLendon Kennels, Inc. v. Investment Corp. of S.Florida,
490 So. 2d 1374 (Fla. 3d DCA 1986) ..... [291a]

Hall v. O'Neil Turpentine Co., 47 So. 609
(Fla. 1908) ..... [291a]

Appendix M

DOCKETED CASES

In re James Grosfeld,
No. 96-4370 (11th Cir. 1996) ..... [223a]

FEDERAL STATUTES

28 U.S.C. 1291(b) ..... [228a]

28 U.S.C. § 1404 ..... [227a]

7 U.S.C. § 9b ..... [223a]

7 U.S.C. § 25 ..... [223a]

Fed. R. Evid. 408 ..... [227a]

STATE STATUTES

Fla. Stat. § 679.318(4) ..... [291a]

OTHER AUTHORITIES

Court Awarded Attorneys Fees, Report of the Third Circuit Task Force,
108 F.R.D. 237 (October 8, 1985) ..... [287a]

National Futures Ass'n Manual, Vol. 4, No. 1 (as of Oct. 1, 1997) at ¶ 9021, Compliance Rule 2-9, Supervision of Telemarketing Activity ..... [223a]

Appendix M

The Nature And Extent Of Telemarketing Fraud And Federal And State Law Enforcement Efforts To Combat It, Hearings Before The Commerce, Consumer and Monetary Affairs Subcommittee of the Committee on Government Operations, House of Representatives, One Hundred First Congress, Second Session, July 11 and 12, 1990 . [236a]

*H. Newberg and A. Conte, *Newberg on Class Actions* (3d ed. 1992) ..... [passim]

B. Clark. *Lump-Summing Structured Settlements and Other Payment Streams: Selected Legal Issues*, Clarks' Secured Transactions Monthly, August 1997 ..... [292a]

Appendix M

Statement Of Jurisdiction

In re Southeast Banking Corp. Secs. Litig., 51 F.3d 1003 (11th Cir. 1995) and *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987), require dismissal of this appeal for lack of standing since no class member has objected to the fee and expense award or has intervened in the action. Defendants expressly and unequivocally stipulated that *they* had no objection to the fee and expense award.[1] Plaintiffs previously moved this Court for an order awarding sanctions and for summary affirmance based on a lack of jurisdiction and frivolousness. A motions panel ordered that motion "carried with the case." July 6, 1998 Order. The merits panel should decide that motion prior to entertaining defendants' appeal.[2]

---

1. (R31-1371) Citations to the record on appeal are indicated as "R" followed by the volume number and docket number as listed in the Certificate of Readiness and the page number if any. Trial exhibits are designated "PX" (plaintiffs) or "DX" (defendants), followed by the page or paragraph number if any.

Plaintiffs'/Appellees' are filing concurrently with this brief a motion to supplement the record to include certain pleadings that appear on the district court docket, but were not designated by the parties prior to the preparation of the Certificate of Readiness. Citations to these pleadings are indicated by their docket entry number "DE." Plaintiffs/Appellees are also moving to include other materials attached to the accompanying motion and indicated by "PSR."

2. Citations to Defendants'/Appellants' Brief are indicated as "AB" followed by the page number. Plaintiffs are responding to defendants' October 13, 1998 Brief. The Court on October 6, 1998

(Cont'd)

Appendix M

Statement Of Issues On Appeal

1. Should the Court entertain defendants' argument that they were "coerced" into their settlement and fee agreement after a five-month trial where that agreement expressly states that it is a "final and complete resolution of all disputes . . . reached voluntarily after consultation with competent legal counsel," and where defendants told the district court that a fee award of one third of the gross amount of the $40 million settlement fund, plus expenses, would be "well within the range of reasonable"?

2. Whether the district court abused its discretion in following Supreme Court and Eleventh Circuit precedent that permits class counsel's fee award to be based on the gross amount of the settlement fund, where doing so resulted in a fee and expense award representing a multiplier of less than 1.1 on class counsel's actual lodestar in this seven-year litigation, where the district court found that the defendants' tactics had helped to dissipate the number of claims filed against the fund, where class counsel conferred a substantial

---

(Cont'd)

struck portions of defendants' September 10 brief and instructed defendants: "to refile a corrected brief deleting all references to documents that are not actually in the record on appeal." (October 6, 1998 Order) Defendants on October 13 filed a brief that violated the order, requiring plaintiffs on October 14 to move to strike portions of defendants' October 13 brief that still violated the Court's October 6 Order, and to seek an extension of time to file this brief. The Court has not as of today ruled on plaintiffs' October 14 motion. Plaintiffs are therefore constrained to respond to defendants' October 13 brief, but reserve all rights on this issue.

benefit on the class and would suffer a multimillion dollar loss if defendants' approach were taken, where no class member objected to the fee and expense award, where defendants, not class members, stand to receive 90% of the proposed reduction in the fee and expense award, and where defendants expressly stipulated to the award and advocated its reasonableness to the district court?

3. Whether the district court abused its discretion in awarding class counsel reimbursement of their out-of-pocket expenses, where the court held three separate hearings on the matter and requested supplementary affidavits and backup materials from plaintiffs' counsel, where defendants' expenses — that were disclosed to the district court at its request for sake of comparison — were 63% greater than those awarded to plaintiffs, and where the district court reviewed each expense item on a category by category basis and disallowed in excess of $200,000 of claimed expenses?

4. Whether the district court erred in holding that the deferred portion of class counsel's fee and expense award is freely assignable, where defendants stipulated in their settlement agreement that it would be assignable, where defendants admit there were no restrictions on assignability in the agreement and under the law restrictions on assignment must be explicit, and where restrictions on assignability are void under controlling law even if included in an agreement?

5. Whether defendants, and their counsel, should be sanctioned for prosecuting this frivolous appeal from their own settlement and fee agreement in which they misrepresent the proceedings below, falsely accuse the district court of

personal animus and of fabricating a record and fail to cite the relevant, controlling law?

Standard Of Review

Questions 1, 4 and 5 are issues of law subject to *de novo* review. Questions 2 and 3 are reviewable only for an abuse of discretion.

Statement Of The Case

After seven years of litigation, and on the eve of closing argument after a five month jury trial, defendants and plaintiffs agreed to settle. A $40 million fund was created to pay the claims of class members, with unclaimed amounts reverting to defendant Grosfeld. The parties expressly agreed that class counsel would limit their fee request to a third of the total fund plus expenses, and that defendants would not object either "directly or indirectly" to a request in that amount. Both sides advocated approval of the settlement to the district court. When asked about the *bona fides* of the agreement, defendants told the district court that the settlement, after deduction of the fee and expense request, would provide an "exceptional" recovery to the class and that a fee and expense request in the amount set forth in the agreement would be "well within the range of reasonable."

After obtaining preliminary approval of the settlement and dismissal of the jury, defendants began attacking their agreement in the hope of cutting class counsel's fee and obtaining a larger reversion for Grosfeld. The district court considered and rejected each of defendants' arguments with

extraordinary patience given its understandable frustration at defendants' tactics. The district court then carefully considered the fee request, departing upward from the usual benchmark range of 20-30% to a 33-1/3% fee award based on, among other factors, the extreme complexity and duration of the litigation, the novelty of the issues and the skill required, and the risk of prosecuting a commodities class action. No class member objected to the fee; the only objection to the settlement was from a single class member who objected to defendants receiving any unclaimed funds.

The record supports but one conclusion: defendants engineered a premeditated breach of their own settlement in order to derail an imminent jury verdict and obtain the benefits of their settlement including their negotiated cap on class counsel's fees, the reversion they now enjoy and dismissal of all claims. Their downside thus protected, defendants now seek this Court's assistance in rescinding their express agreement on fees and expenses. Recognizing that the record bars this appeal, defendants claim that they were "coerced" into their agreements by class counsel and a hostile, biased district court that "consciously disregarded" controlling law in order to "punish" them and "send a message" to the commodities industry. Defendants then accuse the district court of actually fabricating defense counsel's statements supporting the reasonableness of the fee and expense request (AB 31) — even though defendants did *not* dispute those statements when they were put on the record below.

Defendants then invent for this appeal supposedly possible alternative settlements which they now claim they

"would have" agreed to and which class counsel "should have" embraced. They would have this Court ignore that it was they who insisted on the reversionary settlement. Defendants also invent industry lore, but produce no support, that reversionary settlements are "very rare" and that the fee award in this case is 400% greater, relative to actual distributions, than any case on record. What declarations they do rely on, they filed long after the final fee hearing and just days before the final hearing on costs — and then failed to appear at the hearing to be cross-examined on their sworn statements. Why? Because none of this was done for the benefit of the district court. Defendants knew their declarations were "not credible" and "contrary" to all their prior representations supporting the reasonableness of the fee and expense award — as the district court noted in its final order. Defendants' belated flurry of declarations filed in the district court was part of a calculated strategy to fabricate a record to support their effort to renege on, and appeal from, their express agreements.

Defendants fail to mention the leading class action fee award precedent in this Circuit — *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768 (11th Cir. 1991) — which, as here, involved a reversionary settlement and which rejected as having "no merit" the argument that no true "common fund" had been established because of the reversion. *Id.* at 771 n.2. Defendants simply ignore the district court's step-by-step analysis of *Camden*, and discussion of the twelve relevant fee factors suggested by *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) — which defendants also fail to cite.

Appendix M

Defendants' version of the facts, a version which they were unwilling to submit to the jury, and their arguments on the law, the jury instructions and the district court's many interlocutory rulings, are of course irrelevant to the issues on appeal. It's too late to complain of an allegedly "biased" district court's "patently erroneous rulings," that deprived Grosfeld of his day in court. Defendants declined to accept the interlocutory appeal which the district court offered them, and which would have provided the correct path to challenge these rulings prior to entry of judgment on the jury's verdict. Defendants instead decided to avoid appellate risks. The Court should hold them to that decision.[3]

The Court should also reject as both irrelevant and meritless Grosfeld's portrayal of himself as the sympathetic victim of a baseless strike suit. This case did not allege "churning" in individual discretionary accounts; it alleged a top-down, unified and successful scheme, pushed by Grosfeld, to bilk investors of virtually all their capital through a variety of time-proven telemarketing boiler room

---

3. Defendants' Commodity Exchange Act ("CEA") "aider and abettor" authorities (AB 9-10 n.7), have all been effectively overruled or otherwise disapproved by the only federal appeals court to have considered the matter. *D'Amato v. Hermanson*, 153 F.3d 464 (7th Cir. 1998). Defendants' reliance on *Rolo v. City Investing Co. Liquidating Trust*, 1998 WL 547050 (3d Cir. 1998) (no RICO aider and abettor liability), as evidencing the district court's alleged refusal to follow the law (AB 9-10 n.7) ignores that neither the Eleventh Circuit nor any other circuit has yet decided this issue, and *Rolo* was decided only long after this case was settled and dismissed. These examples only demonstrate the difficult and emerging issues in this area of the law and underscore why it was in everyone's interest to settle and avoid appellate risks.

techniques.[4] This action raises none of the concerns that motivated Congress to enact the Private Securities Litigation Reform Act ("PSLRA") — namely, precluding securities strike suits that ultimately harm the interests of the very class members they purport to champion (*i.e.*, shareholders), by holding corporate treasuries ransom to class counsel based on innocent declines in stock prices. This is not a "securities class action" notwithstanding defendants' repeated and calculated mislabeling. Congress not only expressly created civil aider and abettor liability under the CEA, 7 U.S.C. § 25(a), it made telemarketing fraud in the solicitation of commodity option customers one of the CFTC's highest priorities. 7 U.S.C. § 9b. It was the CFTC that sued defendants' companies for massive sales fraud causing them to go out of business. In fact, rules of the National Futures Association ("NFA"), the industry self-regulatory body that operates in conjunction with the CFTC, require that any commodity firm employing former salespersons of closed firms — specifically mentioning MultiVest Options, Inc. — to adopt "stringent supervision procedures . . . in order to ensure that the improper training [these salespersons] have previously received does not taint their sales efforts on behalf [of their firm]." *National Futures Ass'n Manual*, Vol. 4, No. 1 (as of Oct. 1, 1997) at ¶ 9021, Compliance Rule 2-9, Supervision of Telemarketing Activity. Since Congress gave the federal courts exclusive jurisdiction to hear CEA civil aiding and abetting claims, 7 U.S.C. § 25(c), the federal

4. Given space limitations, we respectfully refer the Court to our April 10, 1996 answer to defendants' earlier unsuccessful writ petition (*In re James Grosfeld*, No. 96-4370) for a point-by-point refutation of virtually all defendants' erroneous legal assertions on class and liability issues.

district courts (and the over-stretched CFTC Enforcement Division) are all that stand between the unscrupulous owners and operators of defunct commodity telemarketing firms and the thousands of commodity investors who are routinely defrauded by such operations.

The question before this Court is not whether a district court should ever consider the reversionary nature of a settlement in determining an appropriate fee. The district court did this. Defendants go much further and urge the Court to adopt a rule that a district court must limit counsel fees to a percentage of the amount of the settlement fund actually claimed, regardless of the circumstances of the case and any injustices that may result. No court has ever taken that approach. Defendants' arguments contradict Supreme Court and Eleventh Circuit precedent requiring an "individualized" approach and permitting class counsel's fee to be based on the entirety of the settlement fund, as well as of decades of jurisprudence giving district courts broad discretion in setting a reasonable fee. It is telling that defendants now ask this Court not only to divest district courts of discretion generally, but to remand the case for an alternative fee determination by a different judge who has no familiarity with this seven-year litigation, and defendants' vexatious and costly tactics — all of this so defendants can renege on their agreement and obtain a reversion of 90¢ of every dollar they propose be cut from counsel's fee.

Defendants' further suggestion that the district court somehow changed the settlement agreement by making plaintiffs' deferred fee obligation assignable is meritless. Defendants again distort the settlement agreement and fail

to cite controlling authority holding that the right to receive payment of money is a right that is assignable as a matter of law.

Statement of Facts

1. Grosfeld's Companies and the Genesis of this Class Action

This class action arose from the fraudulent sales activities of a South Florida telemarketing boiler room called MultiVest Options, Inc. ("MOI"). MOI, and its parent, International Precious Metals Corporation ("IPMC"), had a long-standing history of serious federal regulatory problems. In 1982, the CFTC, the governmental agency charged with regulating precious metals and commodity sales, sued IPMC for, among other things, fraudulent sales solicitation. (R82-1396 at 1130) Although IPMC quickly paid the government a $200,000 fine and agreed to change its business practices, it later began using the same offices and management personnel to telemarket exchange-traded commodity options through its wholly owned subsidiary, MOI. (R92-1406 at 3303-04) The CFTC and the NFA began a lengthy investigation of MOI's activities. (R82-1396 at 1141-43) In 1988, the NFA sued MOI for company-wide fraudulent sales practices and imposed the then largest fine ever assessed in NFA history. (R82-1396 at 1245-49; R92-1406 at 3400; R83-1397 at 1462) Grosfeld's lawyers, upon receiving the complaint, described it as, "alleg[ing] garden variety fraud," but "containing certain allegations which have class action potential." (PX 377, 380) In January of 1990, the CFTC sued MOI for company-wide, management supervised patterns of

misconduct and sought an injunction to close the company permanently. (PX 737; R31-1365 (Foley Dep) at 390)

James Grosfeld, through a holding company called MultiVest, Inc. ("MVI") owned and controlled 100% of both IPMC and MOI. (R89-1403 at 2696) While defendants claim that Grosfeld was never named in the CFTC complaint, negotiations with the CFTC and his lawyers' investigation led all to conclude that he would be named (R31-1365 (Foley Dep) at 334-35); this ultimately caused MOI to stipulate to a permanent injunction and to go out of business — as evidenced by a note discussing the risks of fighting the CFTC action:

1. Dump evid[ence] on pub[lic] record
2. Class actions road map
3. Increased likelihood of JG [i.e., James Grosfeld] being named and officers
4. Lessens ability to settle in future
5. Publicity

(PX 425 (Ex. Q to DE 1049), *see also* R92-1406 at 3293) Other problems noted in fighting the CFTC action were: "Too expensive, will lose, possible receiver." (PX409[5] (Ex L to DE 1049); R31-1365 (Foley Dep) at 341-43)

---

5. The CFTC receiver, after taking control of MOI's insolvent estate, waived the company's attorney-client privilege. *See* (Cont'd)

Upon filing of the CFTC complaint, Grosfeld fraudulently transferred millions of dollars in assets of the holding company MVI to himself and his minor son without consideration and without input from the company. (R92-1406 at 3289-3293, 3320-3324) This class action was then commenced in April of 1990 to recover investor losses from Grosfeld. The very day plaintiffs filed this class action complaint, Grosfeld began transferring over $30 million (later over $50 million) — without consideration into a tenancy by the entirety with his wife, an effort which the district court found to be not only "constructively fraudulent," but motivated by Grosfeld's "actual intent" to defraud the plaintiff class by leaving them with nothing more than a "paper judgment." (R17-692 at 3, 8, 12)

2. The Proceedings Through Trial

Defendants made the case expensive. Following a 28 U.S.C. § 1404 transfer, several judicial reassignments, initial discovery and briefing, the district court certified the case as a class action in 1993. (R4-150) The case subsequently proceeded with exhaustive merits discovery with 50 document productions around the country (R32-1480 ¶ 14) and voluminous motion practice of more than 125 motions (including 14 motions for summary judgment or

---

(Cont'd)

Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343 (1985) (authorizing such a waiver). Although the district court held that the specific lawyer notes mentioned above were inadmissible for purposes of trial (because of Fed. R. Evid. 408), plaintiffs asserted error in that ruling and are entitled to refer this Court to that evidence on this appeal. (R25-1058)

partial judgment). Defendants were cited numerous times for frivolous and contemptuous tactics. (*E.g.*, R3-114, R8-331, R11-471, R13-543, R8-351) The case was set for trial on several occasions and as each trial date drew near, defendants filed motions for delay. (*See* Docket at DE 389, 506, 1089) In 1996, defendants unsuccessfully petitioned this Court for a writ of mandamus setting aside the district court's class certification order and dismissing the case.

Defendants then asked the district court for permission to file an interlocutory appeal pursuant to 28 U.S.C. 1291(b). (R19-781; R21-989) The district court told defendants then — and on repeated occasions afterwards — that after developing a trial record it would allow defendants an interlocutory appeal of all of the class certification and complex liability issues prior to entering judgment on the jury's verdict. (R19-789; R28-1228; R126-1442 at 8303; R129-1434 at 8339, 8344; R132-1518 at 60, 89) The district court also adopted a trial plan that would permit defendants (following remand from that interlocutory appeal) to engage in individualized proceedings to rebut the reliance of each class member on any fraudulent omission found by the jury. *Waters v. International Precious Metals Corp.*, 172 F.R.D. 479, 485-89 (S.D. Fla. 1996). Thus, defendants' "coercion" argument about a non-bondable judgment is specious.

Following a month-long pretrial proceeding held in September of 1996, the district court commenced jury trial of this matter on October 7, 1996. Forty-eight witnesses testified at trial and approximately 950 exhibits were introduced into evidence. The record of these proceedings fills approximately 8350 pages in 55 volumes. Documents

directed to Grosfeld included the following statements about the sales practices of his companies:

> IPMC's niche in the ETO business is similar to its market position in leverage and dealer options. It is a high-priced product targeted at unsophisticated individuals and sold through aggressive telemarketing. (PX 148 at I-8)
>
> The competitive environment has traditionally been ignored since the belief is that the company develops its own market and sells to these individuals through high-pressure sales tactics. (*Id.* at III-1)
>
> In a stable price period, the customer stands little chance of making gains and customer turnover is high as customers are sold, lose their money and don't return. . . . Customers seldom call-in to buy these options but are sold the investment through high-pressure sales tactics. (*Id.* at I-6)
>
> In periods of relative tranquility, purchasing leverage contracts is not based on economic rationality but on high pressure selling techniques. (*Id.* at I-5)
>
> Reselling [ETOs] is a function of persuading the customer that his funds are better used in an alternative commodity option. This requires basic knowledge of information on commodity trends. At present, this information is disseminated by

> Irv Rice in five minute Ft. Lauderdale office meetings prior to opening trading. Irv does no formal research prior to his presentations. (*Id.* at II-15)

Documents specifically addressed to Grosfeld also evidenced that his constant pressure on management to sell these "unsophisticated" customers through "high pressure" tactics was causing compliance problems. Among other notable references are the following:

> Mr. Grosfeld's impact on the company is enormous and has had a negative effect on management recently. (*Id.* at II-1)

> Mr. Grosfeld's approach to the company is seen as strictly short-term financially oriented. Because he is the only shareholder, management bends backwards to meet his concerns. (*Id.*)

> In practice, Mr. Grosfeld is CEO and K. Jerry Phillips is Chief Operating Officer. (*Id.* at II-19)

> When Mr. Grosfeld speaks to others in the organization, it appears to undermine the COO and the management objectives and guidelines of the company. For example, when Mr. Grosfeld spoke to a sales manager directly, the pressure created by the volume requests caused a serious deviation from compliance standards. (*Id.* at II-2)

> This uncertainty about Mr. Grosfeld's motives and methods spills over to senior management. (*Id.*)

Additional evidence demonstrated that Grosfeld improperly pressured sales managers to increase sales. (R97-1411 at 3842, 3850, 3851-52) Senior management wrote to Grosfeld, urging him to stop with his threatening management style that was undermining compliance standards and leading to high-pressure sales tactics: "Profitability is driven by sales. Sales are not created through threats, coercion or withholding income that employees believe is fair." (PX 203 at 3) Senior management advised Grosfeld that his "temperament and expectations are not totally consistent with the nature and volatility of this company's business and success requirements" (*id.*), and told him in tactful terms that the company needed "to be managed with a light hand." (*Id.* at 5) Grosfeld's domination allowed him to execute transactions involving hundreds of thousands of dollars without the knowledge of anyone else in management. (PX 128) Grosfeld demanded and received daily faxed sales reports even though the compliance manager told the Vice Chairman that Grosfeld's obsession with daily profits was creating problems. (R89-1403 at 2805; 2833-34; R114-1439 at 7160-61; R92-1406 at 3853-57) Efforts to create a buffer between Grosfeld and MOI's president, Jerry Phillips, failed to alleviate Grosfeld's intolerable interference in the company, as evidenced by the following note from Phillips to Grosfeld:

> You originally told me that your intention in bringing Selwyn [Isakow] in was so I wouldn't

> have to deal with you because it was difficult. Selwyn has the same or more difficulty dealing with you and in fact is structuring a deal so he can minimize how much he has to deal with you regarding MultiVest Options. In addition, I am having to do deal with Selwyn in exactly the same manner as I had to deal with you — so nothing has changed. In fact, it can be more difficult since you are still the major decision maker. (PX 151)

Defendants' arguments about Grosfeld rarely visiting the company evidence nothing more than Grosfeld's efforts to shield himself from liability for MOI's actions. Grosfeld purported to resign from formal management and entered into so-called "consulting" agreements that compensated him for his "substantial day-to-day" involvement in the company. (PX 142) Grosfeld took pains to make sure that his name was removed from certain documents that could tie him to the company in the eyes of investors. (PX 396, 235) Grosfeld's involvement was "kept very secret." (PX 396, 235; R113-1427 at 6912; *see also* R82-1396 at 1150) Phillips, in a communication with Grosfeld, specifically noted his own role in shielding Grosfeld from liability:

> In position as Chairman, Chief Executive Officer and President [I am] on the front-line from the standpoint of liability and reputation — and [have] and continue [ ] to shield the owner [i.e., Grosfeld] from the negative aspects of this business. (PX 465)

And the ugliness of the facts developed at trial demonstrates why Grosfeld needed a liability "shield."

Appendix M

Defendants' efforts to paint MOI as a professional organization, with a few bad apples, ignores the record evidence. Part of defendants' scheme was just the approach that defendants try on this Court: MOI held itself out to be a reputable firm of commodity professionals who would help customers understand and manage the risk of investing in risky options in return for an exorbitant 25% commission levied on each trade. (PX 17, 29, 230, 264; R82-1396 at 1214; R83-1397 at 1443, 1448-49) But MOI promoted a unified "Ask for Action" training program that stressed high-pressure manipulative sales tactics that included the use of fraudulent sales scripts expressly designed to lead customers to believe that they would maximize potential profits and minimize the risks by investing with MOI. MOI accordingly trained brokers on how to develop a "counselor" and "trusting" relationship with customers to manipulate them into relying on MOI's presentation that the customer could achieve financial objectives by trading options with MOI. (PX 459 (at 8-57, 8-14, 8-26), 462, 577, 334; R97-1411 at 3912; R82-1396 at 1218-19, 1221, 1241-42; R84-1398 at 1707, 1694-95, 1697, 1714-15, 1687-88; R76-1390 at 232-255; R80-1394 at 668-69; R31-1362 (Nafeiy Dep) at 38-39, 86-87)

Even MOI's Director of Compliance admitted to the basic fraudulent content of MOI's core presentation to customers (it wasn't "reasonable" for customers to believe that they could achieve their financial goals by trading regularly at MOI), and that he complained to President Phillips about it. (R82-1396 at 1221 *see also* R78-1392 at 562)

It was far worse than just this one big lie. Sales managers engaged in widespread and repeated patterns of fraudulent

practices including condoning excessively aggressive tactics, using known corrupt salespersons as role models to teach other salespersons their tricks, unduly pressuring salesmen for additional production. (R97-1411 at 3857-59, 3861; R82-1396 at 1154-57; *see also* R78-1392 at 576, 579-581; R82-1396 at 1158, 1169, 1171, 1183)

And at the "heart" of MOI's training program, according to the Vice-Chairman, was teaching salespersons to use high pressure sales tactics. (R97-1411 at 3913) Hardly what customers expected from the trustworthy counselor MOI held itself out to be.

Not surprisingly, in this top-down and bottom up boiler room culture, both salespersons and compliance officers testified about the rampant use of various frauds *du jour*, telephone tricks, misleading sales scripts, threats and intimidation by management to encourage excessive trading of accounts, management rules that made it difficult for customers to obtain return of their moneys, the public humiliation of compliance officers who tried unsuccessfully to enforce CFTC and NFA rules, the inability to fire and indeed the rewarding of known fraudulent salespersons who were high producers, and the outright teaching of practices including "rolling," "loading," "bumping" and "net trading" which managers expressly *taught* salespersons should be used to "burn" and "churn" customer accounts. (R76-139 at 249-314; PX 462, 253, 470, 576-583; R31-1365 (Foley Dep) at 299-301; R77-1391 at 421-22; R80-1394 at 666-68, 670-71, 673-77, 681-82, 735; R81-1395 at 1005, 1070-75, 1055-57, 1087, 1092; R82-1396 at 1152-57, 1159-60, 1163-64, 1185, 1292-93; R84-1398 at 1548-49, 1551-63, 1685; R97-

1411 at 3863-64, 3866, 3869, 3878, 3881-82, 3912; PX 230, 459, 470, 502, 508, 509; R31-1362 (Nafeiy Dep) at 36-39, 43, 45-48, 55-56, 59-61, 66-67, 71-74, 77-78, 83, 86-87, 100-01, 131-32, 135-36, 146-49, 227, R78-1392 at 550, 562, 569-80, 585, 587-588, 590-91; R31-1362 (Rennie Dep) at 26-28, 37-39, 40-41, 44-45, 74, 97-98, 113-16, 121; Vol. II, 10-11, 163; R31-1363 (Dorsch Dep) at 114-46, 152-70, 189-95, 206-08, 222-27, 237-40, 266, 328-29, 346-48, 360, 451-52, 463-65, 468-69)

A company compliance officer summed up the boiler room atmosphere of MOI as follows:

> They had whistles and they would clap, when they made a good buy, when they sold out a new position, when they got new clients, it was very hyped. A lot of them walked around, waved their arms and paced and spun their chairs around and high-fived each other. It was, you know, like a zoo. (R80-1394 at 672:24-673:3; *see also* R84-1398 at 1563-64; R78-1392 at 587-88)

When the federal regulators audited the company, salespersons and compliance personnel were instructed, with the knowledge of the compliance department officers, to hide their scripts, sales materials, and compliance memos from the regulators and to falsify logs of compliance monitoring by the company before showing them to the regulators. (R99-1413 at 4167-69; R76-1390 at 263; R78-1392 at 572-76; R80-1394 at 691) When the CFTC became skeptical about MOI's documentation purporting to evidence discipline of corrupt salespersons, and asked for specific information

about salespersons who were allegedly fired, the company had its attorney Mr. Bonner forward false information to the agency. (PX 330; R110-1424 at 6287-6322)[6]

The result of defendants' operation speaks for itself: MOI lost $122.4 million for its customers (R88-1402 at 2482; *see also* R92-1406 at 3328-33), of which $96.2 million, or 81%

---

6. The sales practices at MOI are strikingly similar to those described in cases involving the criminal prosecution of commodity option boiler room operators. *See, e.g., United States v. Brien*, 617 F.2d 299 (1st Cir. 1980). Defendants' suggestion that Grosfeld's companies were not "boiler rooms" because they had fancy offices in several cities, employed numerous persons and provided the CFTC standardized risk disclosure statement is a common refrain that courts and regulators have repeatedly rejected. *See, e.g., Kelly v. Carr*, 442 F. Supp. 346, 350-354 (W.D. Mich. 1977) *aff'd in part, rev'd in part on other grounds*, 691 F.2d 800 (6th Cir. 1980) and *Kelly v. Carr*, 567 F.Supp. 831, 836-838 (W.D. Mich. 1983) (rejecting these arguments and giving a detailed description of a large, organized commodity option boiler room which, like MOI, used canned sales scripts and high-pressure sales tactics); *see also Clayton Brokerage Co. v. CFTC*, 794 F.2d 573, 580-81 (11th Cir. 1986) (risk disclosure statement does not prevent liability under the CEA). For a detailed discussion of telemarketing fraud in the sale of regulated commodity exchange traded options, and other financial instruments, that addresses and rejects defendants' various arguments, see *The Nature And Extent Of Telemarketing Fraud And Federal And State Law Enforcement Efforts To Combat It*, Hearings Before The Commerce, Consumer and Monetary Affairs Subcommittee of the Committee on Government Operations, House of Representatives, One Hundred First Congress, Second Session, July 11 and 12, 1990, statement of Dennis Klenja, Director of CFTC Division of Enforcement at 667, 678; Statement of Lawrence H. Fuchs at 424-25; statement of Kent Neal at 141.

of the loss, went to MOI as commissions. (R88-1402 at 2485-86; *see also* R92-1406 at 3329-33) Ninety-four percent of MOI customers lost money. (R88-1402 at 2484) The average loss was $5888, and the average profit of the 5.7% who escaped MOI was $2400. (*Id.* at 2484) MOI officers knew how poorly their customers were faring from internal reports. (R78-1392 at 521-22; R92-1406 at 3358-59) Even then Grosfeld wanted to *increase* the commission to 40%. (R92-1406 at 3360-61)[7]

The district court, contrary to defendants snipes was not sending a message to the ETO industry or punishing defendants for the sale of ETOs (AB 37); it was considering a boiler room, which happened to sell ETOs and which was giving the legitimate ETO industry a black eye. *See also* Reply on Summary Affirmance motion at 16-18 & n.6. The NFA now requires monitoring of former MOI salespersons, not of all ETO salespersons.

---

7. Defendants complain that the Court would not allow "industry based evidence" that 90% of all commodities investors lose. (AB 22) The district court ruled correctly, however, that industry folklore and other ersatz expert testimony did not meet *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) standards. In any event, it didn't matter how the customers at other firms did; the point was that MOI's core sales presentation was fraudulent and nobody in their right mind would have invested with MOI had they known about MOI's rotten-to-the-core boiler room culture. *See, e.g., Apache Trading Corp. v. Toub*, 816 F.2d 605, 608-11 (11th Cir. 1987) (noting it is actionable fraud under the CEA to promise advisory services which the company has no intention or ability to provide).

3. The Settlement Negotiations

a. Early Unsuccessful Negotiations

Defendants' unsupported assertions that plaintiffs assumed unreasonable settlement positions and thereby precluded early resolution of the case, is contrary to the record evidence. (AB 45, 50) Defendants precluded meaningful mediation in 1994 by willfully disobeying the district court's orders requiring Grosfeld to make certain financial disclosures (necessitating the district court's further intervention at that time). (R12-494) Defendants failed to respond to numerous settlement overtures made by plaintiffs' counsel and flatly rejected at least two offers by the court to help the parties with settlement — including the district court's offer to provide a non-binding "summary jury trial" and the special master's offer to serve as a third-party escrow agent for the blind exchange of settlement numbers. (R35-1539 at ¶¶ 6-26)[8] Defendants always made clear that they were going to trial and would not settle for anything approaching the $40 million fund that they eventually paid. (R35-1539 at ¶ 25) The record evidence demonstrates that defendants did not engage in any serious settlement negotiations until this Court denied their writ petition and the district court commenced trial. (R35-1539 at ¶¶ 6-26 and ¶ 25 particularly)

---

8. Plaintiffs brought this episode to the district court's attention in response to Mr. Kaminsky's false declaration accusing plaintiffs of having prolonged the litigation. (R35-1539 at ¶ 16) Mr. Kaminsky, one of the defendants' counsel, then denied knowing about this event, even though the record discloses he was there. (R35-1546 at ¶ 8; R48-642 at 845-48)

b. Final Negotiations

At or about the time the trial began in September 1996, defendants put plaintiffs' counsel in touch with Mr. Dodyk for purposes of discussing a settlement. It was during these lengthy and ongoing discussions that *defendants* — not plaintiffs — insisted on a reversionary settlement. (R35-1540 at ¶ 11) Because the sides were historically so far apart on their numbers, and mutually mistrustful, the parties felt that the best way to obtain settlement momentum was to complete to the last detail the settlement documents before discussing specific numbers. (*Id.* at ¶ 5) This process would also ensure that once the parties reached agreement on numbers, negotiations would not break down over the details and the complicated documentation. (*Id.*) Thus, contrary to defendants' suggestion (AB 27), plaintiffs had agreed to a reversionary settlement long before closing arguments.

Each provision of the written documents was negotiated at arms-length. (R35-1540 at ¶¶ 5-7) The settlement stipulation provided that Grosfeld would create a settlement fund against which claims could be filed by class members and from which the fees and expenses of plaintiffs' class counsel and the settlement administrator would be paid. (R31-1371 at ¶¶ 2.2, 6.3) Of this amount 25% was to be paid in cash. (*Id.* at ¶ 2.2) The remaining 75% was to be paid in the form of an interest-bearing master promissory note secured by an irrevocable letter of credit from a prominent national bank. *Id.* The settlement provided for a plan of allocation among class members who timely filed claims with a third-party settlement administrator in relation to each class member's recognized loss as a percentage of the settlement

fund as a whole. (*Id.* at ¶ 6.3) Any amounts not claimed by class members or used to pay the fees and expenses of counsel and the settlement administrator were to revert to Grosfeld. (*Id.* at ¶ 6.2(e))

Class counsel negotiated for the free transferability of the promissory notes so that class members who did not wish to hold their notes and earn the interest could immediately hypothecate them:

> The individual Promissory Notes shall not be restricted to prevent them from being sold or discounted to other persons or financial institutions and shall be transferable to the heirs and assigns of Authorized Claimants. (R31-1371 at ¶ 2.2)

Plaintiffs' counsel expressly told defendants' counsel that they may seek to collateralize any deferred portion of their fee. (R33-1503 at ¶ 3) Plaintiffs' counsel, contrary to defendants' assertions (AB 60-62), specifically negotiated for a provision making any deferred portion of the counsel fees payable on the same terms as the freely transferable promissory notes:

> Any fee award which is not paid in cash shall be paid in a form of an obligation having the same terms and bearing the same interest rate as the Promissory Notes [to individual class members], as defined in the Stipulation. (R31-1373 at ¶ 12)

Appendix M

As the district court noted, this term appeared in the January 31, 1997 preliminary approval order, which was fully incorporated in the Stipulation. (R33-1515 at 2)

Defendants expressly agreed not to object to a fee of up to one third of the *gross* settlement fund amount, plus expenses, *in return* for plaintiffs' agreement not to request a larger fee:

> Plaintiffs' Class Counsel of Record *shall* apply for fees in an amount *not to exceed* 33-1/3% of the *Settlement Fund* plus their costs and expenses. . . . Defendants will *not directly or indirectly oppose* Plaintiffs' Class Counsel of Record's application for fees and expenses or compensation of the Representative Plaintiffs. (R31-1371 at ¶ 7.1) (emphasis added)

The stipulation also stated:

> The parties intend this Stipulation to be a *final and complete* resolution of *all disputes* between them with respect to the Litigation and the Conveyance Litigation. In addition, the Defendants agree that the amount paid to the Settlement Fund reflects a good faith settlement of the claims of the Representative Plaintiffs and the Settlement Class, reached *voluntarily* after consultation with competent legal counsel. (*Id.* at ¶ 10.1) (emphasis added)

The stipulation also provided:

> The Plaintiffs' Settlement Counsel and Defendants shall use their best efforts in good faith to secure approval of the Settlement Agreement set forth in this Stipulation and shall not attack this Stipulation in the settlement approval process. (*Id.* at § 2.11)

Not only did Grosfeld agree to these provisions, he expressly agreed in the Note Administration and Pledge Agreement, that any effort to contest the validity or enforceability of any of these settlement provisions would constitute an "event of default" under the settlement. (R31-1371, Ex. F-3 at 4)

The parties also drafted and stipulated to a form of class notice that expressly told class members that counsel would be requesting a fee and expense award of one-third of the gross settlement fund amount, plus expenses, that class members would receive no more than 20% of their recognized losses if the fee request were approved, that any unclaimed amounts would be returned to defendants and that defendants would not be objecting to the requested fee. (R31-1371 at Ex. A1 ¶¶ 28, 29)[9] Moreover, the timing of the fee hearing — which was to take place, as is typical, prior to the expiration of the claims process — also documents the

---

9. Defendants' accusations that the co-drafted class notice was misleading rests on their absurd assumption that the notice was supposed to anticipate the number of claims that would be filed and then summarize the arguments defendants make before this Court. (AB 33, 58)

parties' intention that the fee would be based on the amount of the settlement fund and not merely on the number of claims filed.

Although the parties successfully negotiated a complete set of settlement documents, they had difficulty agreeing upon an amount for the settlement fund. Defendants' counsel finally called plaintiffs' counsel and offered to fund the settlement with $40 million in cash and notes only on the evening before closing arguments. (R35-1540 at ¶ 6) Defendants' prior offers had been below that amount by in excess of $10 million. (R35-1539 at ¶ 26) Contrary to defendants' view, class counsel did not suddenly cave. Defendants finally made a very reasonable offer, while class counsel were concerned over difficult threshold jury instructions, detailed verdict questions, novel issues and lengthy appeals. (R32-1480 at ¶¶ 17-18; R34-1538; R129-1434 at 8338, 8340)

4. Preliminary Approval of the Settlement and Dismissal of the Jury

When the district court learned of the settlement — just moments before closing arguments — it specifically asked about the amount of attorneys' fees that would be requested and whether that amount had been "worked out" by the parties. (R126-1442 at 8259) The district court was told that the parties had agreed that plaintiffs' counsel could — without objection — request a fee amount of up to 33-1/3% of the $40 million settlement fund plus costs and that costs were "north" of $2 million. (*Id.* at 8268) The district court then expressly summarized its understanding of the

agreement by noting that an award of the agreed-upon fee, if allowed, would result in a net settlement fund for distribution of approximately $24 million. (*Id.* at 8268)

With the jury waiting in the jury room to hear closing arguments following this lengthy trial, the district court was understandably taken aback by having to parse through a lengthy and complicated settlement document. The court stated it was inclined to go forward with closing arguments, and to take a sealed verdict while reviewing the terms of the proposed settlement. (*Id.* at 8257) But because the settlement would cease to be binding once the jury was charged, the district court postponed closing arguments and sent the jury home. (*Id.* at 8261-62, 8290) It was in this context that the district court made the off-the-cuff comment about counsel "cutting and running" that defendants now point to. (*Id.* at 8293) What defendants leave out is that the district court, after taking time to review the settlement and meeting with the parties, later apologized on the record for this comment and explained that the court had been frustrated with being presented with the settlement for the first time before closing arguments in a lengthy case. (R129-1434 at 8342)

For several days, the district court conducted a series of hearings and conferences to review the details of the settlement. While some of these conferences took place in chambers off the record or by telephone, the court later recited on the record various statements which defendants now deny making, although defendants did not dispute them at the time they were put on the record. During those meetings, the court raised various concerns about the settlement agreement and obtained various concessions from

both sides. (R127-1440; R128-1441) At no time during these discussions did defendants suggest they had a "projection" of any claims rate. Defendants did not then tell the district court they had been "coerced" into the settlement. Defendants did not then tell the court they were forced into a "clear-sailing" agreement. To the contrary, Mr. Dodyk, defendants' settlement counsel, vociferously argued that the settlement was fair and reasonable and that even after deduction of the proposed fee the settlement would represent a recovery which, in his experience, was exceptional. (*See* R132-1518 at 35) Indeed, the parties *jointly* presented the district court with a study done by the National Economic Research Association ("NERA") as supporting the fairness of the settlement and reasonableness of the fee request. (R133-1535 at 25-26; R35-1544 at 3-4 & n.3) Defendants' counsel, when asked about the fee, assured the district court that "a fee of one-third the gross amount of the settlement fund would be well within the range of reasonable," "perfectly reasonable." (R132-1518 at 42; R133-1535 at 26; see also R35-1544 at 4)

After several days of exhaustive review, discussion and modification of the settlement, the district court held a hearing in open court, at which time Mr. Cooper, plaintiffs' settlement counsel, again on January 31 set forth the basic terms of the settlement and summarized some of the in-chamber discussions. (R129-1434 at 8323-32) The NERA report, which had originally been produced in chambers, was officially made a part of the record. (R31-1444) Mr. Cooper then specifically stated that the settlement represented "20 percent recovery to the class of their out-of-pocket losses after deduction of the attorneys' fees, which we will request,

and have requested, of one-third of the recovery plus expenses." (R129-1434 at 8330:17-20) Mr. Cooper also stated: "This is a very significant recovery, your Honor, . . . considering other class actions that are settled in the United States." (*Id.* at 8330:24-25) When the district court asked defendants if they had anything to add, Mr. Dodyk stated that he believed Mr. Cooper had correctly outlined the settlement and that he had *nothing* further to add. (*Id.* at 8336-38)

The district court then entered the stipulated preliminary approval order and told the parties it was dismissing the jury. (*Id.* at 8351-52) That order *again* expressly states both that (1) defendants are *not* objecting to the fee and expense request, and (2) any deferred portion of that fee and expense award will be subject to the same terms as the Promissory Notes (which are freely assignable). (R31-1373 at ¶ 12) The district court set a final approval hearing for March 31, 1997, at which time class members who had filed timely objections to the settlement notice could appear at the hearing, if they desired, and be heard.

5. Defendants' Breaches and the District Court's Fairness Hearings

Having locked class counsel into their negotiated fee cap through entry of the preliminary approval order and dismissal of the jury, defendants then began to undermine and renege on their agreements. First, they attempted to minimize the number of claims filed by class members by instructing the settlement administrator not to use an address locator service — requiring the district court's intervention.

(R130-1550 at 4-5) Next, defendants urged the district court to wait to see how many claims were actually filed against the settlement fund and only award plaintiffs' class counsel a percentage of the amount actually claimed, as opposed to a third of the fund created as they had stipulated. (R132-1518 at 82) Finally, defendants took issue with virtually every item listed on plaintiffs' counsel's expense application. (R32-1493, R33-1513, R34-1529)

One of the first issues addressed at the March 31, 1997 fairness hearing was the settlement administrator's draft engagement letter (estimating a class claims notice response rate). Defendants serve up a hearsay declaration in support of their assertion that plaintiffs counsel tried to "suppress" the administrator's estimate of the response rate. (AB 34) This is not only untrue, it is a perversion of the far more serious misconduct by defense counsel to mislead first the district court and plaintiffs, and now this Court. That January 24, 1997 letter on its face shows it was sent *solely* to Mr. Dodyk prior to the January 31 preliminary approval hearing. Mr. Dodyk apparently hid the letter from the district court and class counsel, who did not receive it until after the *jury* was dismissed. (R132-1518 at 7) It was *plaintiffs' counsel* who then insisted that the district court put this matter on the March 31 agenda so the court could examine Mr. Dodyk as to his reasons for not previously sharing this letter, and to enlist the court's assistance in obtaining from the settlement administrator a formal undertaking that would, among other things, ensure that all reasonable efforts be used to locate class members. (*Id.* at 8-10) When the court questioned Mr. Dodyk on these matters, he had to admit on the record that the letter had been sent solely to him. (*Id.* at 10) He then

attempted to justify his conduct and to prevent the court from getting involved in defining the settlement administrator's duties (*i.e.*, searching for class members) by telling the court that it was neither customary nor appropriate for the district court to involve itself in such matters. (*Id.* at 10-11) The district court disagreed and said it wanted to be involved in obtaining a formal undertaking from the administrator. (*Id.* at 12-13)

It was only after Mr. Dodyk was exposed by plaintiffs finding out about the letter, that he *on March 7* first filed the letter with the district court as an attachment to his argument that the district court should not instruct the administrator to use an address locator service. (R32-1493) And then only after his personal debacle at the March 31 hearing did he file his April 24 declaration to which he now cites. (AB 34) His April 24 declaration was for the purpose of creating an appellate record to falsely suggest that class counsel had some *prior* "projection" of claim estimates. The fact remains, however, it was Mr. Dodyk who "suppressed" this letter until after the settlement was preliminary approved and the jury was dismissed.[10]

---

10. Defendants also erroneously suggest that class counsel had indications from the MOI receivership claims experience that few class members would file claims against the settlement fund. (AB 28) The exact opposite is readily apparent from the record (R34-1539 at ¶¶ 32-34) and the receiver's Notice and Proof of Claim form (PRS 1 and 2). First, the receiver's Notice, citing statute of limitations defenses, strongly discouraged claims from all customers other than those trading ETOs during the last two years of MOI's five-year existence — thus most of MOI's 20,000 customers would not have been expected to respond. Second, there was little

(Cont'd)

Appendix M

Out of a class of approximately 20,000 individuals, the court received only one objection to the settlement. (R132-1518 at 38-39) That objection came from Carol Orkin who objected to defendants receiving any reversionary interest in unclaimed funds. She told the district court she did not object to class counsel's fee and expense request. (*Id.* at 63:12-22) Furthermore, no class member has intervened or appealed the district court's final approval order.

The district court reviewed the history of the case, including the in-chambers, off-the-record discussions, noting that even defendants had agreed that the settlement, after deduction of fees and costs, would "produce an exceptional benefit to the class members." (R132-1518 at 35) The district court went on to note that defendants had — prior to the jury's dismissal — expressly supported the reasonableness of the fee:

> Now, I do want to note that the settlement's stipulation that the — excuse me, that the fee request of one-third of the settlement fund is the

---

(Cont'd)

motivation to file claims against a receivership with no stated assets where the claim form required lengthy answers to open-ended defense-type interrogatories to justify MOI's liability to each customer. This $40 million settlement, by contrast, guaranteed each respondent a 20% return of their losses, and offered an 800 telephone help line to answer claim form questions. Third, class counsel expected that the administrator would be able to locate close to 95% of the class members with a locator service. That 3000 out of perhaps the 7000-8000 customers who purchased ETOs in only 1988 and 1989 responded to the unappetizing receiver notice, suggested a large response to a guaranteed average recovery of $1200.

> maximum amount of fees that the parties agreed — the parties, that's both sides — agreed could be sought pursuant to the settlement stipulation that the Court approved at the end of January, *after being assured by both sides that a fee of one-third of the gross amount of the settlement fund would be well within the range of reasonable*. (R132-1518 at 42:10-18 (emphasis added))

All of defendants' counsel who signed their brief in this Court were present in the district court and took no issue whatsoever with the district court's summary of what they had previously said during the in-chambers, off-the-record preliminary approval discussions. In fact, moments later when asked whether defendants wanted to comment on any of the matters being covered, defendants' counsel said they had only one comment concerning the request of class member Carol Orkin for an extension of time in which class members could make claims. (*Id.* at 51:8-25)

Defendants' assertions that the district court never made such a statement *until* its May 8, 1997 order, and that the court fabricated its statements in that order are obviously patent falsehoods. (AB 31) Their arguments on pp. 31-32, however, reveals the heart of their appeal; only if they can convince this Court that the district court lied, do they even have a chance in this Court.[11]

---

11. Defendants' desperate array of non-sequiturs and feigned shock to prove the court a liar, only further condemn them. First, that plaintiffs did not refer to defense counsel's statements in support

(Cont'd)

Appendix M

The district court noted that defendants now wanted to back out of their obligations under the agreement, while obtaining all the benefits and imposing a multimillion dollar loss on class counsel. (R132-1518 at 82-83) Contrary to defendants' assertion that the district court was misled, the court expressly understood that a substantial portion of the settlement fund might not be claimed. (*Id.* at 91-92) The court also noted that even fewer class members would have been able to claim but for plaintiffs' counsel's efforts in overcoming defendants' opposition to the settlement administrator using the locator service to resend claims packets to persons whose addresses had been stale:

> That came about not because of the efforts initiated — not because of efforts initiated by the settlement administrator, as I understand it, but because pursuant to the request of class counsel the Court ended up ordering the settlement administrator to contract with another vendor to

---

(Cont'd)

of plaintiffs' fee means nothing. There was no need for plaintiffs to remind the court of the contrast between defendants' in-chambers statements and their conduct. There was nothing plaintiffs could do then about defendants' breach — the relevant question then before the court was to review the reasonableness of the settlement and the fee request. (R132-1518 at 3-4) Second, defendants' "gift" argument — why should we not try to stop the one-third fee award since the court might actually award the one-third fee discussed at the preliminary approval hearing — further betrays that defendants never intended to honor the settlement agreement. The agreement was that plaintiffs would not seek more than one-third of the *settlement fund*, not one-third of the claims eventually made.

obtain updated addresses. (R132-1518 at 37:20-25)

The district court addressed each of defendants' objections and methodically went through each of the relevant fee determination factors required by this Court in *Camden*, noting that most of them resulted in an upward adjustment of the normal fee benchmark. (*Id.* at 85-94) The district court had before it not only the NERA study of nationwide fee awards, but the declaration of Steven Senderowitz of Chicago, who specializes in complex commodities litigation and who has authored articles on commodities and commodities regulation. (R32-1481) He was former deputy chief of the special prosecution division of the U.S. Attorney's office in Chicago where the world's largest commodity futures exchanges are located, and where he was actively involved in the supervision of both on-market and off-market boiler room cases. Mr. Senderowitz' declaration noted the difficult groundbreaking nature of this class action suit against the upstream operators of a defunct commodity telemarketing firm and demonstrated how favorably the results in this action compared to other private commodities litigations and CFTC restitution programs. (*Id.* at ¶¶ 11, 12, 17) Defendants simply ignore this evidence, as well as class counsel's fee application citing to numerous cases throughout the United States (in both published and unpublished decisions) supporting the reasonableness of the fee award. (R32-1482, Ex. D; R32-1480)

Plaintiffs also note that although a party must object to preserve an issue for appeal, defendants repeatedly told the district court that they were not actually objecting to

plaintiffs' counsel's fee and expense award and that they still *fully supported* the settlement. They told the Court that they were merely concerned that certain representations by plaintiffs were incorrect, and might taint approval of the settlement, thereby raising, "the risk that any approval of the settlement by the Court on the current state of the record might be subject to attack [presumably by absent class members and not by defendants themselves]." (R33-1513 at 1-2) They told the district court that although they believed they would have "prevailed at trial and on appeal," they nevertheless "recognize[d] the cost, burdens and uncertainties of this litigation and urge[d] that the Court approve the proposal." (R32-1493 at 6) They told the district court that they were not making any "formal overt objections." (R132-1518 at 190) They told the district court that they supported the settlement and that they "are not going back on any agreement." (*Id.*) When the district court expressed disbelief and stated that it had at least construed defendants' statements as "opposition," defendants told the court it was "overstat[ing]" their position. (*Id.* at 203-204)

The district court awarded plaintiffs' counsel a fee award of one-third of the $40 million settlement fund or $13.3 million, with $5 million of this amount to be payable in cash and the remainder to be payable as a deferred obligation. (R33-1516 at ¶ 14) The court, however, refused to award plaintiffs' counsel the bulk of their expenses, *agreeing with defendants* that additional documentation was necessary. (R132-1518 at 96-98) The court ordered plaintiffs to provide additional detail and further ordered defendants to disclose their own expenses for comparison sake prior to the next hearing. (*Id.* at 103) Those expenses were disclosed

to be in excess of $3.8 million, far greater than those of plaintiffs. (R34-1530)

On April 25, 1997, the district court held a hearing to resolve the remainder of plaintiffs' counsel's expense requests. Three days before that hearing, and long after the March 17, 1997 stipulated deadline for filing objections had expired, defendants filed a motion requesting the district court to alter or amend its prior fee award. (R34-1528) Notwithstanding that defendants and plaintiffs had jointly provided the district court with the NERA study when asking the court to approve the settlement, defendants now attacked that study, claiming to have done a telephone survey of *unidentified* counsel supposedly involved in the cases included in that study, and concluded from their own "hearsay" survey that the fee and expense award was "excessive." Defendants also filed a response to plaintiffs' supplementary cost back-up data. Defendants nonetheless again claimed that they were not really opposing counsel's fee and expense application. (R34-1529; R34-1532 at ¶ 19)

At the April 25 hearing, none of the three defendant lawyers who filed these last-minute declarations appeared in court. The court went through plaintiffs' expense request on an item-by-item basis and awarded those amounts that it deemed appropriate and allowable. The court even held a third hearing on the expense award via telephone on April 28, 1997, after requesting additional information. (R134-1534)

At the end of the April 25 hearing, the district court expressed displeasure that defendants had taken advantage

of her hospitality in having off-the-record preliminary approval discussions and the court noted that defendants had earlier agreed that a fee and expense award in the amount requested and awarded would be "perfectly reasonable":

> [T]he settlement was advocated vigorously by both sides in an effort to overcome my objections to it . . . the court had specific concerns about the amount of attorneys' fees . . . the NERA study was offered by *both sides* . . . as authoritative; . . . *it was represented to me that the fee award sought was well within the range of common practice in these types of cases*; and because I was concerned about the amount of costs, I asked for an estimate at the time.
>
> An estimate was put on the table by the plaintiffs. It is pretty much in line with what the costs have ended up being, and everyone thought that would be *perfectly reasonable*. That's what matters to me. What matters to me is what went on in my conference room. (R133-1535 at 25:19-26:14) (emphasis added)

Although Messrs. Dodyk and Kaminsky, who had filed their last-minute declarations attacking the reasonableness of the fee and purporting to recite fictional settlement discussions, failed to show up at the hearing to be cross-examined, Mr. Bonner was in court *and — once again — did not object to the district court's statements about defendants' prior representations.*

Appendix M

In its final order denying defendants' motion to alter or amend the fee award, the court found that defendants' motion was "frivolous." (R35-1544 at 1) The court also noted that defendants' evidence in support of the motion (namely their continuing unsupported claim that the award is 400% greater, relative to class distributions, than any prior case) was based entirely on hearsay, that it was inconsistent with defendants' counsel's prior representations, and that it was defendants' counsel who previously had advocated the NERA study as supporting the proposed fee: "in those discussions, counsel for both sides assured the Court that their experience and the findings contained in the NERA study would support an attorneys' fee award in [the amount of $13,333,333]." (*Id.* at 3 n.3) The district court even noted that it had personally telephoned the author of the NERA study who contradicted the representations that defense counsel was making about the information contained in the report. (*Id.* at 4)

The district court also noted that defendants' position was contrary to law, including Supreme Court precedent, was in violation of defendants' express stipulations under the agreement, and was contrary to public policy. Specifically, the district court noted that a fee award based solely on the number of claims actually received would reward defendants for having unnecessarily prolonged the litigation (something they are continuing to attempt to do) knowing that the claim rate decreases with the passage of time. (*Id.* at 6) The district court also noted that independent of any objection by defendants, it would be "highly inequitable" under the circumstances of this lengthy and expensive case to adopt defendants' position. The Court noted that its March 31, 1997 *Camden* analysis required an

upward adjustment to the benchmark. (*Id.* at 6-7) Finally, the district court noted that defendants' conduct had been "distasteful" and that notwithstanding their "self-serving pronouncements to the contrary, their contentions can have only one objective — a reduction in the amount of the fees already awarded to Plaintiffs' counsel pursuant to the agreement of the parties." (*Id.* at 7)

Summary Of Argument

Defendants' express stipulations and statements below bar their appeal under any number of doctrines, including standing, mootness, waiver and estoppel.

Defendants fail to discuss the standards governing this Court's review of a class action fee award and ignore the district court's detailed discussion of each of the relevant factors. Defendants assert — without record support — that reversionary settlements are "very rare," that the district court's fee and expense award was 400% greater than any prior award in this Circuit and that class counsel could have, and should have, agreed to a lesser *pro rata* settlement that was never offered.

Supreme Court and Eleventh Circuit precedent recognizes that awarding class counsel a fee based on a percentage of the entire fund created for the benefit of the class promotes predictability, encourages class counsel to fight for a larger fund and takes account of the economic realities of law practice by providing reasonable compensation. No case, or policy supports defendants' argument that class counsel's fee must be limited to a

percentage of the amounts claimed. To the contrary, the reasoned decisions have concluded that such an approach would lead to unpredictability, create enormous pressure for class counsel to settle at all costs and discourage the prosecution of meritorious claims.

Defendants' reliance on their "clear sailing" cases is misconceived since the district court conducted a thorough review of the settlement and specifically found no evidence of a strike suit or collusion. Moreover, there was no "clear sailing" because defendants breached the settlement agreement and vigorously opposed each aspect of class counsel's fee and expense request beginning the moment the jury was dismissed. Additionally, those cases do not permit a party to the stipulation to avoid his *own* agreement; to the contrary, all the cases preclude defendants' attempt at a partial rescission or reformation of their own settlement.

The deferred portion of class counsel's fee and expense award is freely assignable both under the express terms of the settlement as well as a matter of law — since restrictions on the right to receive money must be explicit, and even then such restrictions are disfavored, narrowly construed, or outright void under relevant law.

Argument

I. THE COURT SHOULD NOT PERMIT DEFENDANTS TO CONTEST THEIR OWN SETTLEMENT

Plaintiffs' motion — which has been "carried with the case" — for summary affirmance and sanctions based on a

lack of jurisdiction and frivolousness sets forth a number of interrelated doctrines (including standing, mootness, waiver and estoppel) that bar defendants' appeal from their own stipulation. Without repeating those arguments here, we make the following additional points.

First, defendants implicitly concede they have no standing by suggesting that the Court should review the fee award "*sua sponte* if necessary" to protect the interests of absent class members. (AB 58)[12]

Second, *even a class member* who fails to object to a fee award, and to intervene in the action, has no standing to appeal from such an award. *See In re Southeast Banking Corp. Secs. Litig.*, 51 F.3d 1003, 1004 (11th Cir. 1995); *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987). Thus, *every* class member has waived any right to appeal the fee and expense award by not objecting and intervening. If an absent class member who was not a party to the stipulation lacks standing to appeal, a defendant who expressly agreed to the fee and expense award cannot assert the fiction that he is representing the interests of absent class members. That Grosfeld is in reality seeking personal gain at the expense of class counsel who created the fund only underlines defendants' legal cynicism.

---

12. *Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355, 360-361 (11th Cir. 1984) and *Washington Gas Light Co. v. Virginia Elec. & Power Co.*, 438 F.2d 248, 250-251 (4th Cir. 1971), cited by defendants merely state the well-established rule that a court — which *otherwise* has proper jurisdiction of an appeal — may consider other issues not raised below if necessary to prevent a miscarriage of justice.

Third, defendants' suggestion that they did not waive their right to appeal the district court's fee award is meritless. Defendants expressly agreed not to object "directly or indirectly" to the fee request in consideration for the cap on class counsel's fees. If defendants could not object, they obviously could not appeal; one must object to preserve an appeal. *See, e.g., Magicsilk Corp. v. Vinson*, 924 F.2d 123, 125 (7th Cir. 1991) (failure to object to fee award waived appeal). Thus, defendants by their agreement automatically waived their appellate rights. Defendants even told the district court they were *not* objecting. Moreover, defendants expressly agreed not to contest any provision of the settlement in any "judicial proceeding" and that doing so would constitute an "event of default" under the agreement. (R31-1371, Ex. F-3 at 4) This appeal is a "judicial proceeding." Any contrary holding would undermine one of the most basic policies underlying the enforcement of settlement agreements — namely, finality.

Fourth, the doctrine of "judicial estoppel" is singularly applicable here to enforce the "general rule that parties entering into stipulations during the course of a judicial proceeding are estopped to take positions inconsistent therewith." *Markow v. Alcock*, 356 F.2d 194, 198 (5th Cir. 1966) Defendants' baseless and personal attacks on the district court, made necessary by their duplicitous strategy, only highlight the doctrine's utility.

II. THE FEE AWARD WAS AN APPROPRIATE EXERCISE OF THE DISTRICT COURT'S DISCRETION

A. District Courts Have Broad Discretion In Determining The Reasonableness Of Class Action Fee Awards

Although defendants challenge the district court's exercise of discretion, they nowhere mention the cases or discuss the standards that guide this Court's review: "a clear showing of abuse of that discretion." *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984). Defendants also side-step appellate courts' aversion to imposing rigid rules on a district court's "broad discretion" to conduct a fairness review of a class action settlement, *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982), including the district court's award of class counsel fees: " 'Individualization in the exercise of a discretionary power [for fee awards] will alone retain equity as a living system and save it from sterility.' " *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F. 2d 768, 774 (11th Cir. 1991) (citations omitted).

Camden — which, as here, involved a *reversionary* settlement — held that district courts should base class counsel's fee award on a reasonable percentage of the fund created for the benefit of the class. The Court further instructed district courts to consider, among other things, the twelve factors set forth in the former Fifth Circuit's decision in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974).

This Court's review is to be "informed by the strong judicial policy favoring settlement as well as by the realization that compromise is the essence of settlement." *Bennett*, 737 F.2d at 986. Furthermore, the relevant facts must be reviewed "in the light most favorable to the lower court's approval of the settlement." *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1145 (11th Cir. 1983).

B. An Unbroken Line Of Authority Holds That The Fee Properly May Be Based On The Gross Amount Of The Settlement Fund

In *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980) (*Van Gemert I*), the Supreme Court held that class counsel's fee award should be measured by the size of the common fund established for the benefit of the class and not merely by the value of the claims eventually asserted against the fund:

> To claim their logically ascertainable shares of the judgment fund, absentee class members need prove only their membership in the injured class. Their right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel. Unless absentees contribute to the payment of attorneys' fees incurred on their behalves, they will pay nothing for the creation of the fund and their representatives may bear additional costs.

Id. at 480. Moreover, the Supreme Court noted that defendant may have a reversionary and "latent" interest in the funds, if

unclaimed, is irrelevant to the fee award. *Id.* at 481-482. Once the settlement fund was established for the benefit of class members, all class members held equitable interests in their respective shares of the fund. *Id.* In assessing fees, it was therefore proper for the district court to look at the entirety of the fund created for the benefit the class.

Relying on footnote 5 of the *Boeing* decision, defendants argue that *Boeing* is inapplicable because this case, they claim, involves a settlement where defendant merely provided "security" against allowable claims, whereas *Boeing* involved a judgment where defendant was unequivocally required to pay the full amount of the judgment pending the failure of class members to submit claims. Defendants ignore that this issue arose in the Supreme Court because defendant argued that taxing class counsel's fees against defendant's reversionary interest would constitute impermissible "fee-shifting." *Id.* at 477. The Court said that it need not decide whether the common fund doctrine would apply — meaning whether it would constitute impermissible fee-shifting — if defendant were required only to give security against potential claims. *Id.* at 479 n.5.

Defendants, however, fail to mention that six years before their settlement this Court rejected the notion that basing class counsel's fee award on the entirety of a reversionary settlement fund would constitute improper "fee-shifting." *Camden*, 946 F.2d at 771 n.2. *Camden* cited to the Supreme Court's *Boeing* decision for the proposition that persons who benefit from a lawsuit should contribute to its costs and held that class counsel's fee award should be based on a percentage of the fund created for the benefit of the

class. *Id.* at 771. The Court noted that the median of such awards tends to fall in the 20-30% range, with 50% being the upper limit, "although even larger percentages have been awarded." *Id.* at 774-75. The Court specifically held that the reversionary nature of the settlement was irrelevant to a determination of whether a common fund had been created for the benefit of the class. *Id.* at 771 n.2. The Court flatly rejected defendant's "fee-shifting" argument as having "no merit" and commented: "The settlement clearly created a common fund for the satisfaction of the County's liabilities." *Id.* at 771 n.2; *accord Skelton v. General Motors Corp.*, 860 F. 2d 250, 254 n.1 (7th Cir. 1988) (rejecting the argument that defendant's right of reversion in a class settlement changed the "common fund" analysis).

While nothing in *Camden* precludes a district court from *considering* the reversionary nature of a settlement, along with the *Johnson* criteria (just as the district court did), *Camden* clearly holds that there is nothing "improper" in basing the fee in a reversionary settlement on a percentage of the entire fund. Indeed, *Camden's* discussion of *Boeing*, and the inequity of class members being "unjustly enriched," suggests that it would be improper for a district court, in making its fee determination, to ignore the total fund created for the benefit of the class. There is no hint in *Camden* that this Court or the district court there, when evaluating the fee, was even aware of any claims filed against the fund (and it is unusual for a district court to have that information since fees are usually set at the time of the settlement fairness hearing, while the claims administration process, as here, usually goes on for months or even years afterward).

The Court could not adopt defendants' position — that a district court *must* await the tally of claims actually received against a reversionary settlement fund and award class counsel *only* a portion of the amount claimed by class members — without overruling *Camden*. Such a result would be particularly inequitable at bar, because it is Grosfeld who would get 90 cents of every dollar of the proposed reduction.[13] If *Boeing* and *Camden* teach us it is inequitable to "unjustly enrich" class members at class counsel's expense, it would be a legal and public policy travesty to do so for Grosfeld.[14]

There is also no rational basis for distinguishing a judgment fund which defendant must pay into court to satisfy any claims (as in *Boeing*) from a settlement fund which a defendant deposits with a third-party escrow agent to satisfy

---

13. While Grosfeld notes that he will get the "larger share" of the reversion were this Court to follow his view of "Eleventh Circuit precedent," he fails to disclose how large. Only by tracing his explanation do we discover that. He seeks a fee reduction of $9.7 million, with $1 million going to the class and $8.7 million going to him. (AB 47 nn.16 & 17)

14. If this Court were to take the drastic step of overruling *Camden*, it should do so only prospectively, so as to avoid the gross inequity of Grosfeld profiting at class counsel's expense from his own calculated breach and from an unanticipated change in the law. If it was fair to base the fee award on the entirety of the fund in *Camden* (where any reversion would have gone to the County's public treasury), it is certainly fair to base the fee on the entirety of the fund in this case (where the reversion goes to Grosfeld who operated a telemarketing boiler room and who explicitly agreed to the fee being based on the gross settlement fund).

claims (as here and in *Camden*). In both cases, a common fund has been created to satisfy the defendant's obligation. In both cases, class members have a presently vested right to obtain a mathematically exact share of the fund by filing a claim. *See Boeing*, 444 U.S. at 479.[15]

Moreover, defendants' argument — concerning overreaching counsel and disproportionate fee awards — is the same misguided public relations argument which was initially adopted by the lower court in *Boeing* and then rejected by an *en banc* hearing of the court of appeal and later by the Supreme Court. *See Van Gemert v. Boeing Co.*, 573 F.2d 733, 735-36 (2d Cir. 1978) (criticizing large fee awards and holding that only the claimed portion of the fund could support a fee award) (*Van Gemert III*), *rev'd en banc*, *Van Gemert v. Boeing Co.*, 590 F.2d 433 (2d Cir. 1978) (*Van Gemert IV*), *aff'd*, *Boeing Co. v. Van Gemert (Van Gemert V)*, 444 U.S. 472 (1980). The Supreme Court noted that the failure to tax a proportional share of attorneys' fees against the entire fund would result in a windfall to non-claiming class members at the expense of claiming class members and class counsel. The late Professor Newberg explained the

---

15. Defendants' suggestion that no "true" settlement fund was created in this case because defendants merely provided "security" for their obligation is specious. It is irrelevant to the size of the recovery, and to the right of class members to receive their shares, whether the defendant funds the settlement fund with all cash (as in *Camden*) or a combination of cash and fully secured, interest bearing, promissory notes (as here). In either case, defendants' maximum liability is fixed by the amount of the fund and every class member is undeniably entitled to receive his or her mathematical share by filing a claim form, which defendants concede is "nothing unusual." (AB 46)

result as being based on the Supreme Court's repeated recognition "that the economic reality of class action litigation depends on the contingent prospect that counsel will create a substantial common fund recovery for the benefit of the class, from which counsel is entitled to receive reasonable fee compensation." 3 H. Newberg and A. Conte, *Newberg on Class Actions*, § 14.03 at 14-14 to 14-15 (3d ed. 1992) (discussing *Boeing* and the leading Supreme Court fee cases).

The Second Circuit *en banc* decision which the Supreme Court affirmed in *Boeing* provides an even more detailed discussion of why defendants' position is untenable. The *en banc* panel noted that a contrary rule would unduly penalize either claiming class members or class counsel. *Van Gemert*, 590 F.2d at 440-41. To award class counsel a reasonable fee bearing some proportion to their effort, courts would be forced to disproportionately reduce the share of claiming class members in order to cover a fee that could be taxed only against those claimants' shares. *Id.* On the other hand, protecting claiming class members by limiting class counsel to a fixed percentage of the fund actually claimed would make the resulting fee entirely dependent on the number of plaintiffs who came forward — notwithstanding the difficulty of the case, the quality of representation or the hours spent by class counsel — thereby potentially saddling counsel with a loss. *Id.* at 441.

The panel also noted that since the number of plaintiffs who will come forward to claim their shares is unpredictable, class counsel would be discouraged from bringing class suits, regardless of the merits of the case. The *en banc* panel concluded:

> To hold otherwise, we believe, would engender serious unfairness to claiming class members and their lawyers, without any corresponding benefit to absentees. Moreover, a contrary result would place enormous pressure on attorneys to settle at all costs, and would deter them from instituting meritorious suits.

590 F.2d at 435. Indeed, the element of predictability — stressed by the *Boeing en banc* panel — was one of the reasons this Court in *Camden* adopted the "percentage of the fund" approach in the first place. *See Camden*, 946 F.2d at 773 (citing that factor in a Third Circuit Task Force Report). Requiring class counsel's fee award to be based solely on the number of claims received — a factor over which class counsel has little or no control — would hardly promote "predictability." It would instead lead to the very problem envisioned by the *Boeing en banc* panel — undue pressure to settle cases at all costs.

Camden also noted that the "percentage of the fund" approach helps "to arrive at fee awards that are fair and equitable to the parties and that take into account the economic realities of the practice of law." 946 F.2d at 773 (quoting the Third Circuit Task Force Report) Adopting defendants' approach — which would require class counsel either to abandon meritorious claims prematurely or to risk a bankrupting loss — hardly accounts for the "economic realities of the practice of law." *See also Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (reversing as an abuse of discretion the district court's refusal to consider the full value of the $4.5 million

settlement fund in calculating an appropriate fee award — even though the claims totaled only $10,000 — and specifically noting that defendants had agreed to base the fee on the full amount of the settlement); *Koppel v. Wein*, 743 F.2d 129, 134 (2d Cir. 1984) ("It is immaterial to an award of attorneys' fees whether beneficiaries claim or accept the benefits obtained on their behalf . . ."); *Skelton*, 860 F.2d at 254 n.1 (rejecting the suggestion that a reversion clause in a class action settlement changes the common fund analysis, citing to *Boeing*); *Rosenfeld v. Collins & Aikman Corp.*, 1989 WL 150926 at *3 n.14; (E.D. Pa. 1989) (accord); *City of Ozark v. Trawick*, 604 So. 2d 360, 364-65 (Ala. 1992) (holding that a class member's individual decision not to claim against the fund cannot reduce the attorney's right to a fee based on the whole fund); 3 *Newberg* § 14.03 at 14-14 (noting that the *Boeing* rule applies even in a settlement where the "defendant reserves the right to recapture any unclaimed portion of the common fund after class members have had an opportunity to make their claims against the fund"); *See also id.* § 11.18 at 11-25 (noting it is "settled" that a fee award may be based "on the total potential benefit to the class," not just the amount of claims "actually exercised by class members").

C. The Settlement And Fee Agreement Were The Result Of Arms-Length Bargaining; Defendants' Mischaracterize The Process And Offer Only Speculative Hypotheticals With No Support In The Record

Citing no authority, defendants claim reversionary settlements are "very rare" and suggest that the idea of a

reversionary settlement was that of *plaintiffs*. Both propositions are untrue. It was defendants who raised and insisted on a reversionary settlement. (R35-1540 at ¶ 11) Plaintiffs agreed both because of defendants' insistence and because the settlement seemed fair under the law, the facts and the procedural posture of the case. (*Id.)*

As noted by Professor Newberg, reversionary settlements are one of several commonly accepted methods for dealing with unclaimed funds. 2 *Newberg*, § 10.15 at 10-38. Indeed, many of the leading cases discussing class action fee awards involved reversionary settlements. *Camden*, 946 F.2d at 771 n.2; *Skelton*, 860 F. 2d at 254 n.1; *In re Crazy Eddie Secs. Litig.*, 824 F. Supp. 320, 323, 326 (E.D.N.Y. 1993) (reversionary settlement where the court awarded $14.2 million in fees representing 33.8% of the gross amount of the $42 million settlement fund, plus $2 million in expenses, in a case where there was no trial). Several courts have held that absent an agreement to the contrary, unclaimed funds *should* revert to the defendant. *See* 2 *Newberg* § 10.17 at 10-40 n.124 (collecting cases). There is authority that even where the defendant's liability to the class has been proven, any unclaimed portion of the judgment amount should revert to the defendant and should *not* be distributed *pro rata* to class members who did file claims. *See, e.g., Van Gemert v. Boeing Co.*, 739 F.2d 730, 736 (2d Cir. 1984) (*Van Gemert VI*); *Van Gemert v. Boeing Co.*, 553 F.2d 812, 815-816 (2d Cir. 1977) (*Van Gemert II*); *see also* 2 *Newberg* § 10.2 at 10-52. These cases reason that the equitable interest in the unclaimed funds belongs to the class members who have *not* claimed, and that class members who have claimed are no more entitled to those funds than is the defendant.

Appendix M

Defendants simply invent a fictional record on appeal and urge this Court to believe that plaintiffs could have and should have negotiated a different (they now suggest $20 million) *pro rata* settlement and defendants would then have agreed to forego claim forms and to adopt an automatic distribution to all class members. There is, of course, no evidence in the record to support any of defendants' self-serving speculations and hypotheticals. The agreement represents the best result each side could obtain after hard-fought settlement negotiations during a seven-year litigation and a five-month trial. The fact that defendants were able to insist on a reversion merely indicates their respective strength in the bargaining process. Since even the unclaimed portion of any judgment may have reverted to defendants, and since plaintiffs would have had to endure multiple appeals, and individualized rebuttal proceedings, before obtaining any enforceable judgment (and its attendant collection problems given Grosfeld's propensity to transfer assets), this settlement was in the best interests of the plaintiff class, as the district court found.

The district court's job in evaluating the fairness of the settlement was not to determine whether there might be some other, hypothetical settlement that might be *more* advantageous to the class, but which was never agreed upon. The district court's job was to evaluate the fairness of the settlement brought before it by the parties and to determine whether *that* settlement represented a fair compromise of the claims given all the attendant circumstances. Similarly, the district court's job was not to determine whether cutting class counsel's fee would be more advantageous to the class; in a common fund case, cutting class counsel's fee *always*

results in more money to the class (although here it is Grosfeld who stands to receive 90 cents of every dollar). The district court's job was to determine a fair and reasonable fee under all the circumstances of *this* case.

Moreover, class counsel in negotiating a class action settlement represents the interests of all class members, not just some subset of the entire class. There is no logical support, therefore, for defendants' assertion that class counsel "should have" negotiated a smaller, non-reversionary settlement under which class members who did file claims would benefit disproportionately to the class as a whole.[16] Class counsel cannot be faulted for negotiating a settlement under which every class member who filed a claim stood to receive the same proportion of his or her recognized loss as any other class member.

It is important to emphasize that while the size of the class was relatively large, the average pay-out to class members filing a claim ($1,200) seemed sufficiently large to provide filing incentive. (R35-1540 at ¶ 11; R35-1539 at ¶¶ 32-33) Indeed, it was a far larger average recovery than individuals typically receive in a class action. (R32-1481 at

16. The sole rationale offered by defendants is that — under the settlement at bar — defendants are entitled to a reversion even before claiming class members receive 100% of their alleged damages. As noted, courts reason that a defendant may be entitled to a reversion even where there has been a judgment. This reasoning applies equally in the settlement context — even if class members have not been fully reimbursed for all of their *alleged* damages — because, but for the defendants' agreement, there would be no obligation to pay "damages" at all, let alone 100% of any particular class member's alleged damages.

¶¶ 12-19) As Professor Newberg has noted, this factor typically results in a higher than average claim rate. *See* 2 *Newberg* § 11.18 at 11-24.[17] Defendants — while downplaying the benefit created by class counsel — readily admit that this settlement recouped a far larger percentage of out-of-pocket losses than the "2% to 10%" that class members typically receive in class settlements. (AB 25) And it is undisputed that the provisions providing a formula for the distribution of the net settlement fund, after the payment of counsel fees and expenses, according to class members' recognized losses, as well as the filing of proofs of claim, are standard and accepted procedures in a class action settlement. 3 *Newberg* § 12.35 at 12-90.

Although defendants had sufficient bargaining strength to negotiate a reversion to themselves, they would have this Court believe that they were forced into their agreement not to object to plaintiffs' fee application and that they were "concerned" about the alleged impropriety of negotiating the fee. (AB 26) This is sanctimonious nonsense; defendants wanted to cap the fee and were anxious to agree on this

---

17. But for defendants' appeal from their own agreement, class members would have received in excess of 20% of their out-of-pocket losses. Class members will now receive 18.8% of their out-of-pocket losses because the district court has — according to the terms of the agreement — set aside additional funds for the potential payment of attorneys' fees on appeal. (R38-1558) Plaintiffs' counsel believes that such fees and expenses, if any, should not be taken from the settlement fund but should be assessed against defendants directly pursuant to Rule 34 in view of their frivolous appeal. We also note that defendants' efforts to limit claims have created two additional appeals which, if resolved against defendants, will increase the class recovery by approximately $2 million. (AB 2 n.3)

important economic term of the settlement. The cases have repeatedly recognized this reality of class settlements. *Evans v. Jeff D.*, 475 U.S. 717, 733-38 (1986); *Malchman v. Davis*, 761 F.2d 893, 905 n.5 (2d Cir. 1985). Counsel fees are typically the largest single claim against any class action settlement fund. A defendant in a reversionary settlement, therefore, cannot give up his right to object without getting value — an agreement by plaintiffs' counsel to limit the amount of the fee request.[18]

The negotiated fee-cap, of course, must also take account of what a "reasonable" fee would be; otherwise a defendant would have no incentive to agree to it. Stated another way, a defendant in a reversionary settlement, gains something by giving up the right to object, only if the cap is set below the highest fee award that the defendant believes the district court might reasonably allow. Following this lengthy litigation (almost five times the median duration of securities class actions in the Southern District of Florida (R32-1481 at ¶ 22)), the lodestar expense to both sides was enormous. Given this Court's decision in *Camden*, plaintiff's counsel could have requested a fee of up to 50% of the settlement fund. Defendants, therefore, bargained for, and obtained, a benefit to themselves by requiring plaintiff's counsel to cap their fee request.

The converse is true as well: plaintiffs' counsel gave something up — not only to defendants, but to the class. Plaintiffs' counsel gave up their right to request a larger fee

---

18. Contrast this with a non-reversionary fund where a defendant can agree not to object to plaintiffs' counsel's fee request without giving up anything to himself.

— which if granted would, of course, have reduced the class members' recovery. Thus, there was a vigorous adversarial process taking place and arriving at what both parties agreed would be a reasonable and, here "non-objectionable," fee award.

D. No Case Has Ever Suggested, Let Alone Held, That The Fee Must Be Limited To A Percentage Of The Actual Claims

No case has ever adopted the rule advocated by defendants; namely, that a district court *must* await a determination of the number of claims filed against the fund and base class counsel's fee *solely* on a percentage of claims filed against the fund. And this case is worlds apart from any of the cases on which defendants rely.

In *Strong v. Bell South Telecommunications, Inc.*, 137 F.3d 844, 852 (5th Cir. 1998), a lodestar circuit, there was *no* common fund established. Instead, class members were to continue in a plan or receive credits for future telephone usage. *Boeing*, therefore, was inapplicable. Moreover, the court did award plaintiff's counsel an amount "which exceeded the lodestar figure plus costs." *Id.* at 851. Similarly, *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297 (N.D. Ga. 1993), involved discount travel certificates that had to be claimed by class members and redeemed through travel agents. Class members had to spend hundreds of dollars on a ticket to be eligible to claim a credit. *Id.* at 308. Although the court did not agree with plaintiffs' counsel that the economic value to the class was the equivalent of the face-value of all the certificates, it awarded counsel a multiplier of 1.83 on their lodestar. *Id.* at 357.

Appendix M

In re Prudential Ins. Co. of America Sales Litig., 962 F. Supp. 572 (D.N.J. 1997), *aff'd in part, vacated in part*, 148 F.3d 283 (1998), also involved no presently determinable "common fund." The potential value of the settlement was dependent upon the success of Prudential's policyholders recovering monies in detailed Alternative Dispute Resolution ("ADR") proceedings against the company. *Id.* at 583. The value of the settlement fund — depending upon various outcomes — could vary by as much $800 million. 962 F. Supp. at 583. The court therefore adopted a bifurcated fee award giving class counsel an immediate fee award equaling 2.55 times counsel's lodestar and reserving the possibility of additional compensation that would result in a lodestar multiplier of 5.1. *Id.* at 592.

Duhiame v. John Hancock Mutual Life Ins. Co., 989 F. Supp. 375 (D. Mass. 1997) was precisely the same sort of complicated and unpredictable ADR determination, without a determinable "common fund." The court, therefore, set up a staged fee award, giving counsel an amount equaling 150% of their actual lodestar and holding additional amounts in escrow pending further order of the court. *Id.* at 380.

In *Wise v. Popoff*, 835 F. Supp. 977 (E.D. Mich. 1993), the court was faced with the very type of strike suit that the Private Securities Litigation Reform Act was meant to address. It was a "minimally sufficient" complaint, the equivalent of a U.S. Army " 'MRE' (Meal, Ready to Eat)," aimed at the corporate treasury and was over in 13 months producing a small class period for which the majority of shareholders could not even file a claim. The court noted that recovery to the class — not to defendants — would be

greatly increased by the reduction of attorneys' fees. Even though the court was highly critical of plaintiffs' counsel, it still awarded counsel a fee equaling their recalculated lodestar of $362,150.92. *Id.* at 982, 983.

Lyons v. Scitex Corp., 987 F. Supp. 271 (S.D.N.Y. 1997) was again a typical securities strike suit settled shortly after filing. The court rejected plaintiff's request for 33% of the settlement fund because it would have resulted in a multiplier of 6.06 times counsel's actual lodestar. *Id.* at 280. The court instead awarded a multiplier of 1.92 counsel's lodestar saying that it was appropriate in the case to adopt a "hybrid" of the percentage of the recovery method and the lodestar method. *Id.* Also, the court noted that attorneys' fees — unlike here — would reduce the class' recovery on a "dollar for dollar" basis. *Id.* at 279.

In *Bowling v. Pfizer, Inc.*, 927 F. Supp. 1036 (S.D. Ohio 1996), the court awarded class counsel a fee exceeding "the value of their services on an hourly basis by more than $6 million and impl[ying] a multiplier of well over two." *Id.* at 1042. The court merely refused to award class counsel a percentage of additional amounts that defendants were not required to pay into the fund until future years. The court instead awarded counsel future fees from future payments as they were made. *Id.* at 1043-44.

Goodrich v. E.F. Hutton Group, Inc., 1996 WL 76161 (Del. Ch. 1996), is a report filed by a chancery court in response to the Delaware Supreme Court's order that the chancery court justify its deviation from the United States Supreme Court's *Boeing* decision. The chancellor noted that

the action alleged the improper use by a brokerage firm of "float" on customer funds and that the greatest measure of damages that plaintiffs would have been able to prove at trial would merely have entitled members of the class to interest for *one additional day* on checks disbursed from their brokerage accounts during the relevant time period. (*Id.* at *1) The cost of making a claim to obtain one day's interest far exceeded the benefit available for making such a claim. (*Id.* at *2, 4) The Delaware Supreme Court's opinion, not cited by defendants, affirmed but also noted that — unlike here — class members did not have a "mathematically" fixed share of the fund because the settlement provided for reductions in their shares if claims under a certain amount were received. *Goodrich v. E.F. Hutton*, 681 A.2d 1039, 1048 (Del. 1996).

None of these cases, therefore, suggests that a district court must, or even should, await the filing of claims by class members and award only a percentage of the actual claims received. To the contrary, the courts in each case took an individualized and flexible approach to determining a reasonable fee under the circumstances of the particular case. And none of these cases, of course, permitted a defendant to benefit from a premeditated breach of his own settlement agreement.

E. No Case Has Ever Permitted A Party To Benefit From A Breach Of His Fee Agreement; Fundamental Contract Principles Prohibit Such A Result

All of the cases specifically addressing the issue at bar have held the defendant to his freely negotiated bargain. As

aptly stated by the court in *In re Copley Pharmaceutical, Inc. "Albuterol" Products Liability Litig.*, 1 F. Supp. 2d 1407 (D. Wyo. 1998):

> Under the terms of that settlement and its remittitur provisions, Defendant not only knew that class counsel would seek to recover fees based on the gross amount of the fund recovered (regardless of whether some part of that fund was not claimed), but also agreed to a mechanism and formula by which class counsel could do so. Thus, defendant cannot complain now that class counsel seek to do what the settlement agreement explicitly contemplates.

Id. at 1416; *accord, Williams*, 129 F.3d at 1027 (noting that the Supreme Court has held that in negotiating a class action settlement, the parties may properly agree on the payment of attorneys' fees and commenting: "The defendants here knew, because it was in the settlement agreement, that the class attorneys would seek to recover fees based on the entire $4.5 million fund .... *The Defendants had some responsibility to negotiate at the outset for a smaller settlement fund if they wished to limit the fees.*") (emphasis added).

These cases merely illustrate the fundamental proposition that settlement agreements are construed pursuant to general contract principles. While the district court was required to consider the fairness of the settlement and the reasonableness of the fee separately in order to protect the interests of class members, no legal principle permits

defendants, who were a *party* to the fee agreement, to modify or reform their stipulation of settlement so as to leave the settlement in place, but to rescind the fee agreement provision. *See, e.g., Evans v. Jeff D.*, 475 U.S. 717, 726-28, 741 (1986) (reversing a court of appeals decision which had invalidated a negotiated fee waiver provision while allowing the remainder of the class settlement to stand); *Leverso v. SouthTrust Bank*, 18 F.3d 1527, 1534 (11th Cir. 1994) (disallowing a deviation from the express terms of a class action settlement noting: "It is well settled that a court cannot rewrite the terms of a contract in an attempt to make otherwise valid contract terms more reasonable for a party or to fix an apparently improvident bargain"); *Beecher v. Able*, 575 F.2d 1010 (2d Cir. 1978) (rejecting defendant's argument that the failure of class members to file as many claims against the settlement fund as originally anticipated should allow him to reform his stipulation to permit a reversion of the unclaimed funds).

While legal rubric varies, the fundamental point is that defendants cannot now seek partial rescission or reformation after obtaining the benefit of the settlement bargain — namely, removal of the threat of verdict, dismissal of the jury, settlement of the case, the substantial reversion which defendants already enjoy, and the negotiated cap on class counsel's fee. Return to the *status quo ante* is now impossible and therefore so is defendants' request for partial rescission or reformation. *See, e.g., Hibiscus Assocs., Ltd. v. Board of Trustees of Policemen and Firemen Retirement Sys.*, 50 F.3d 908, 917 (11th Cir. 1995) (no rescission unless prior conditions may be restored).

F. Defendants' "Clear Sailing" Cases Do Not Permit Them To Appeal From Their Express Agreement

Nothing in the "clear sailing" cases cited by defendants provides a basis for this Court to reverse the district court's fee and expense award. Those cases merely hold that a private fee agreement between the parties to a class action settlement does not obviate a district court's independent responsibility to review the reasonableness of a fee request. Those cases do not suggest that if a district court does, in fact, conduct an independent fee review that the *defendant* who entered into the agreement can then appeal the district court's determination and thereby avoid his *own* agreement.

Weinberger v. Great Northern Nekoosa Corp., 925 F.2d 518 (1st Cir. 1991), was a meteoric derivative strike suit resolved in a few months with plaintiffs' counsel holding a lawful merger hostage and threatening the financial interests of the class — *i.e.*, shareholders who stood to benefit from the merger. Worse, plaintiffs' counsel, who was appealing, had hidden the "clear sailing" agreement from the district court, wrongly telling the court that the defendant had agreed to pay a specific — $2 million — fee, rather than disclosing that the defendant had merely agreed it would not object to a fee up to the specified amount. *Id.* at 524 n.7. The amount of the requested fee was in excess of three times counsel's lodestar. *Id.* at 529 n.13. Nothing in the First Circuit's opinion states that it is improper for class counsel and defendants to negotiate a fee agreement as part of a class action settlement. The First Circuit did recognize, however, that the presence of a "clear sailing" agreement where, as there, the "lawyers were in a position to coerce a fee agreement . . . regardless

of whether there was any merit to their claim," *id.* at 525, required the district court to closely scrutinize the reasonableness of the fee request since the normal adversary process, where the defendant objects, was lacking.

In *Malchman v. Davis*, 761 F.2d 893 (2d Cir. 1985), numerous *class members* had objected to, and appealed from, the district court's approval of the settlement and the fee award. The Second Circuit was concerned that the district court had performed only a cursory review. The Second Circuit nevertheless found no evidence of collusion and affirmed the district court's fee award. In doing so, the lead opinion of Judge Oakes was *actually critical* of the analysis of "clear sailing" agreements which defendants cite to in Judge Newman's concurring opinion, noting it was based on an unrealistic view of the settlement process:

> [W]here, as here, the amount of the fees is important to the party paying them, as well as to the attorney recipient, it seems to the author of this opinion that an agreement "not to oppose" an application for fees up to a point *is essential* to completion of the settlement, because the defendants want to know their total maximum exposure and the plaintiffs do not want to be sandbagged. It is difficult to see how this could be left entirely to the court for a determination after the settlement.

Id. at 905 n.5 (emphasis added).

Defendants also cite *Prandini v. National Tea Co.*, 557 F.2d 1015 (3d Cir. 1977) for the proposition that it is

improper simultaneously to negotiate a class action settlement and an agreement on class counsel's fee award. The Supreme Court rejected this notion in *Evans v. Jeff D.*, 475 U.S. at 733-38, noting as did Judge Oakes in *Malchman*, that it is essential to the completion of a settlement for a defendant to know his maximum exposure under the settlement. Indeed, in *Evans*, the Supreme Court rejected the argument that negotiation of fees as part of a class settlement had unfairly "coerced" a party into an unfavorable fee agreement. *Id.* at 728-29. To the extent that *Prandini* continues to have any force, it teaches only that district courts must ensure that any agreement on fees was not the result of a "collusive" settlement that traded away the rights of class members.

In this context, it is important to note that *Weinberger*, *Malchman* and *Prandini* were not "common fund" cases, but were instead "fee-shifting" cases where the attorneys' fees are paid directly by the defendant separate from any fund created for the class. In that situation, there is a very real danger that the defendant will agree to pay an unusually large fee in return for class counsel's agreement to a small settlement amount on behalf of the class. In a common fund case, class counsel's fees are in this Circuit "tied" directly to the size of the settlement fund negotiated on behalf of the class and, not as defendants argue, to the amount claimed. (AB 39, 45) Regardless of whether defendant objects to class counsel's fee request, class counsel can never receive an amount exceeding a reasonable percentage of the fund created for the benefit of the class. Class counsel, therefore, has incentive to negotiate for the largest fund possible. *See Camden*, 946 F.2d at 773-774 (noting this dynamic as a

beneficial feature of the "percentage of the fund" approach). Class counsel agreed to the cap on their fee request as part of the settlement documentation long before the parties even tried to agree on the actual amount of the settlement fund. This is the procedure which *Camden* expressly endorsed. (*Id.* at 773-74)

Further, defendants' "clear sailing" agreement was honored only in the breach. Defendants *did* oppose plaintiffs' fee and expense application beginning the moment the jury was dismissed. *See, e.g., In re Texaco, Inc.*, 90 Bankr. 622, 630 (Bankr. S.D.N.Y. 1988) (noting there was no "clear sailing" despite the agreement). The district court specifically found that the agreement was not the result of collusion, but that it had been negotiated vigorously at arms-length. *E.g., Duhaime*, 989 F. Supp. at 379 (noting no collusion despite "clear sailing" agreement). The fee and expense award represented not only a permissible percentage of the fund created (33-1/3%), it represented a permissible and modest "multiplier" of less than 1.1 on plaintiffs' lodestar — this after a seven-year litigation and millions of dollars of counsel's investment at risk.

Moreover, defendants' efforts to disclaim responsibility for protecting their own interests during settlement negotiations, and to characterize their agreement as the result of "coercion," bears comment. Defendants claim they were "concerned" with the alleged "impropriety" of their agreements at the time they entered into them. They did not, however, inform the district court of any of those alleged beliefs at the time they presented the proposal to the district court for approval. Nor did they ever raise this "concern" or

write a confirming letter in this most mistrustful of litigations. Further, while they apparently secretly believed that "few" class members would claim and that class counsel's fee would therefore prove disproportionate to amounts claimed, they did not disclose these alleged beliefs to the district court prior to dismissal of the jury. (R35-1540 at ¶ 12) And for good reason. Defendants plan was to settle the case and breach the fee agreement; their plan precluded making the district court doubt the *bona fides* of the settlement. Thus, defendants take the holdings of their "clear sailing" cases — designed to prevent collusive settlements aimed at harming the interests of absent class members — and pervert them beyond recognition in support of a premeditated breach of their own agreement.

Against this background of duplicitous dealings with the district court, defendants offer this Court no moral or policy reason to rescue them from their own agreement. They were happy to have the district court consider the full value of the gross settlement fund in determining the reasonableness and adequacy of the settlement, but they now ask this Court to consider only the amount of that fund actually claimed. Reduced to its essence, defendants' position is that they should be relieved of any responsibility for their own settlement negotiations and their representations to the district court. They wrongfully seek to characterize themselves as innocent victims who were the target of an unfounded strike suit (not only brought by plaintiffs, but by the CFTC and the NFA). In doing so, they hope to take advantage of the current political backlash against class counsel specializing in such suits. The district court properly saw through defendants' machinations, labeling them as

having "public relations appeal but [being] entirely contrary to law and to public policy." (R132-1518 at 85:13-15)

G. The District Court Properly Applied *Camden*

In making its fee determination, the district court not only addressed defendants' arguments, it also addressed each of the relevant factors set forth in this Court's *Camden* decision, including the twelve-point *Johnson* factors. The district court rejected defendants' unsupported assertion that reversions are "unusual." (R132-1518 at 85) The court found that adopting defendants' approach would discourage class action attorneys from undertaking difficult cases which could be prosecuted only at a loss. (*Id.*) The court noted that the case required an "abnormally high" expenditure of time and effort due to the novelty and complexity of the issues and the "unusually aggressive" defense. (*Id.* at 88) The court found that the case required a higher degree of skill than the average class action. (*Id.* at 89) The court found that class counsel was actively and continuously involved in the case to the point of being unable to devote any significant time to other matters. (*Id.*) The court found that the fee recoveries in comparable types of actions approximated 30% of the fund created for the benefit of the class. (*Id.* at 87) The court found that the contingent nature of the case created a substantial risk for class counsel — only two firms, one with only two lawyers. The court found that a recovery of out-of-pocket losses of between 20% and 30% represented "a substantial recovery for an investment-related class action," a factor which defendants apparently concede. (*Id.* at 91) The court specifically found that the actual dollars paid out would likely be substantially less than the full $40 million amount of the gross settlement fund, but that class counsel could not be

faulted for this possibility. (*Id.* at 91-92; R35-1544 at 6) The court found that class counsel were the only law firms who expressed a desire in prosecuting this difficult case at substantial risk to themselves. (R132-1518 at 92-93) The court found that settlement discussions were unusually difficult. (*Id.* at 93-94) The court also found that the case had fulfilled a public policy role in providing an avenue of redress for investors who had been defrauded through deceptive and high-pressure sales tactics. (*Id.* at 94) There is ample evidence in the record to support each of these findings which must be reviewed in the light most favorable to the district court's determinations, not according to defendants' self-serving recital of the facts.

Defendants' complaint about the quantity of material provided in support of plaintiffs' counsel's lodestar is a red herring since under this Circuit's "percentage of the fund" approach, a *detailed* lodestar analysis is no longer required. *See, e.g., In re Prudential Ins. Co. America Sales Litig.*, 148 F.3d 283, 342 (3d Cir. 1998) (approving of district court finding that detailed time summaries were unnecessary since the lodestar was merely being used to double check the percentage award); *Johnston v. Comerica Mortgage Corp.*, 83 F.3d 241, 246-47 (8th Cir. 1996) (reversing district court's denial of class fee award based on failure to provide time records since counsel reasonably believed the fee would be based on a percentage of the fund).[19] Plaintiffs' counsel

19. Indeed, it was in large part due to the substantial burden on district courts in reviewing detailed lodestar documentation that led this Court in *Camden* to adopt the "percentage of the fund" method for calculating fees. 946 F.2d at 773. *See also Court Awarded Attorneys' Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 246 (October 8, 1985).

supplied all the lodestar information that was requested by the district court and there was no evidence, or even serious suggestion, that counsel's lodestar figure of $12.6 million was inflated. (R132-1480 at ¶ 9; R33-1502 at Ex. B) Although defendants supplied no evidence of their fees for comparison, their admitted expenses exceeded those of plaintiffs by a substantial margin. Defendants' further complaint that counsel's lodestar was improperly stated using current hourly rates is meritless. *See Camden*, 946 F.2d at 775 n.7; *Skelton*, 860 F.2d at 255 n.5.

In sum, the only *evidence* offered in support of the alleged "excessiveness" of the fee award is the unfortunate fact that not as many class members filed claims as plaintiffs had believed would file claims. The district court specifically found that this fact was partially of defendants' creation (due to delaying tactics and efforts to prevent the remailing of class notices) and partly due to the district court's crowded docket (over which plaintiffs had no control). (R35-1544 at 6) The district court specifically found that it would be "highly inequitable" under the circumstances of this case to saddle class counsel with a multimillion loss for circumstances over which they had little or no control. (*Id.*)

While defendants assert repeatedly throughout their brief that the fee and expense award was "more than 400% of the amounts, relative to the class distributions, heretofore awarded by the courts of the Eleventh Circuit," there is absolutely no evidence in the record to support this assertion other than defendants' alleged *ex parte* telephone survey which the district court found was self-serving "hearsay" in direct contradiction with defense counsel's prior

representations. Indeed, the district court confirmed its understanding of the methodology used in the NERA report by calling one of the authors of the report personally. (*Id.* at 3-4) Moreover, defendants' suggestion that there were no unclaimed funds in any of many settlements contained in the NERA survey lacks credibility on its face. It is well recognized that class action settlements *usually* result in unclaimed balances, the disposition of which is left in the district court's discretion. *See, e.g., Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990) (noting that "[m]ost class actions result in some unclaimed funds," and discussing the various alternatives used by courts for distributing such funds). Defendants' failure to cite to *Camden*, a reversionary settlement, is illustrative.

Even assuming any validity to defendants' survey, however, and its 400% figure, defendants did not consider that this seven-year litigation was some five times the median duration of securities class actions filed in the Southern District of Florida (R32-1481 at ¶ 22), went to a five-month jury trial, posed two much smaller firms (one with two lawyers) against at least six law firms who unnecessarily prolonged the litigation, and was much more difficult to prove than a securities fraud-on-the-market case. Thus, while defendants' "statistical" notion (if proven) might have been of some interest in a different context, it is meaningless against the long torturous history of this case and the day-to-day realities faced by the district court, a court which defendants would now marginalize with attacks on its integrity.

III. THE EXPENSE AWARD WAS ALSO APPROPRIATE

The district court initially denied virtually all of class counsel's claimed expenses, agreeing with defendants that insufficient backup material had been provided to the court. Class counsel expressly asked the district court what materials it would like to review since documentation for each invoice in a seven-year litigation would fill many boxes. (R132-1518 at 98-101) The district court requested and received an affidavit from class counsel and from class counsel's controller — and class counsel brought their controller to court for examination and further offered to provide the district court with backup material for any questioned item. (*Id.* at 182-184; R34-1521; R34-1522; R34-1526) The district court conducted two additional hearings on the expense application, and allowed or disallowed items on a category-by-category basis. (R133-1535, R134-1534) The district court ultimately disallowed in excess of $200,000 of requested expenses, notwithstanding that defendants' expenses exceeded those of plaintiffs by a substantial margin.

Defendants' further complaint that the expense award as a percentage of the fee award is larger than that in most other cases ignores that few class actions are ever litigated through trial. *See* 3 *Newberg* § 12.55 at 12-122. Expenses obviously mount over time and increase relative to fees once the cost of a trial must be absorbed. *Cf. Crazy Eddie*, 824 F. Supp. at 323, 326 (awarding $2 million in expenses and over 33% of a $42 million reversionary settlement fund in a case that never went to trial).

IV. THE FEE AND EXPENSE AWARD IS ASSIGNABLE AS A MATTER OF LAW

Although the record demonstrates that defendants agreed the fee and expense award would be assignable (*supra* at 20-21), it is unnecessary for the Court to reach that issue to affirm the district court's order. According to defendants' view, the agreement was "silent" as to whether the fee and expense award was assignable. (AB 26) The agreement expressly states that it is to be construed according to Florida law (R31-1371 at ¶10.13), and under Florida law it is well established that contractual rights are freely assignable unless the agreement *expressly* provides otherwise. *Hall v. O'Neil Turpentine Co.*, 47 So. 609 (Fla. 1908); *L.V. McLendon Kennels, Inc. v. Investment Corp. of S. Florida*, 490 So. 2d 1374-75 (Fla. 3d DCA 1986). Silence equals free assignability under Florida law. *See also Classic Concepts, Inc. v. Poland*, 570 So. 2d 311, 313 (Fla. 4th DCA 1990). Even express restrictions are construed narrowly. *Cordis Corp. v. Sonics Int'l, Inc.*, 427 So. 2d 782, 783 (Fla. DCA 1983) (" 'The law draws a distinction . . . between performance due under a contract and assignment of the right to receive contractual payment.' "). In fact, even express restrictions on assignment of the right to receive payment are void in Florida under the UCC. *Florida First Nat'l Bank v. Fryd Constr. Corp.*, 245 So. 2d 883 (Fla. 3d DCA 1970); Fla. Stat. § 679.318(4).[20] Thus, regardless of Grosfeld's

20. Defendants' response to the clear language of the UCC is to quote a commentary explaining why *specifically enumerated* transactions, not relevant here, were excluded from the Code's otherwise comprehensive coverage. Defendants' *ipse dixit* is that (Cont'd)

claims about his intent, counsel's deferred obligations must be freely assignable.

Moreover, defendants lack standing to contest the assignability of the fee and expense award since the settlement agreement expressly provides that it is an obligation of class members to be paid by the settlement administrator from the settlement fund, and not an obligation of defendants. (R31-1371 at ¶ 7.3) Defendants' obligation remains precisely the same regardless of whether class counsel assign the right to receive payments from the settlement fund to a third party. Defendants' position reduces to hypertechnical spite.

Finally, defendants have not bothered to address the rational in the Court's March 25, 1997 order on this issue. (R33-1515)[21]

(Cont'd)
the deferred obligations are "*sui generis*," part of a litigation settlement, and therefore not part of a commercial financing transaction. But they are. As one respected commentator observes, "[t]he sale of streams of payment arising out of structured settlements is big business," B. Clark. *Lump-Summing Structured Settlements and Other Payment Streams: Selected Legal Issues*, Clarks' Secured Transactions Monthly, August 1997; *cf. In re Hayes*, 168 BR 717 (Bankr. D. Kan. 1994) (discussing the assignment of structured settlement payments as creating security interests under the UCC).

21. The "assignability" issue was exhaustively briefed in plaintiffs' reply on pending motion for sanctions and summary affirmance. Given space limitations, plaintiffs respectfully refer the Court to that briefing.

Appendix M

CONCLUSION

The Court should affirm the district court's orders in all respects and award sanctions against defendants and their counsel.

Dated: October 20, 1998

Respectfully submitted,

NEIL A. GOTEINER
GARY S. ANDERSON
C. BRANDON WISOFF
KAREN P. KIMMEY
FARELLA BRAUN
& MARTEL LLP
235 Montgomery Street
San Francisco, CA 94104
Telephone: (415) 954-4400

ERIC G. LIPOFF
RARING & LIPOFF
3070 Bristol, Suite 650
Costa Mesa, CA 92626-3072
Telephone: (714) 429-2970

By: /s/ C. Brandon Wisoff
C. Brandon Wisoff

Attorneys for Plaintiffs
WILLIAM WATERS and
LINDA BARTHOLOMEW
and those similarly situated

APPENDIX N — MOTION OF PLAINTIFFS-APPELLEES FOR LEAVE TO FILE SUPPLEMENTAL BRIEF TO ADDRESS ONE MISTATEMENT IN DEFENDANTS-APPELLANTS' REPLY BRIEF DATED NOVEMBER 30, 1998

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-5074

WILLIAM WATERS AND LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated,

Plaintiffs-Appellees,

vs.

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, Individually and as Trustee of the Jason Grosfeld Trust, MULTIVEST REAL ESTATE, INC., S.S. MELBOURNE, INC., and THE CYPRESS GROUP, INC.,

Defendants-Appellants.

MOTION OF PLAINTIFFS-APPELLEES FOR LEAVE TO FILE SUPPLEMENTAL BRIEF TO ADDRESS ONE MISTATEMENT IN DEFENDANTS-APPELLANTS' REPLY BRIEF

Appendix N

NEIL A. GOTEINER
GARY S. ANDERSON
C. BRANDON WISOFF
KAREN P. KIMMEY
FARELLA BRAUN
& MARTEL LLP
235 Montgomery Street
San Francisco, CA 94104
Telephone: (415) 954-4400

ERIC G. LIPOFF
RARING & LIPOFF
3070 Bristol, Suite 650
Costa Mesa, CA 92626-3072
Telephone: (714) 429-2970

Attorneys for Plaintiffs and Appellees
WILLIAM WATERS and LINDA BARTHOLOMEW
and those similarly situated

Appendix N

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with F.R.A.P. 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2, 26.1-3, and 27-1, undersigned, counsel state that the following are interested persons and entities:

Gary S. Anderson (Counsel for Appellees/Plaintiffs)
Linda Bartholomew
(Appellee/Plaintiff, Class Representative)
R. Lawrence Bonner (Counsel for Appellants/Defendants)
Victor F. Caldwell (Counsel for Appellants/Defendants)
Justin Y.K. Chu (Counsel for Appellants/Defendants)
Certified Class of MultiVest Options, Inc. for Customers
(Appellees/Plaintiffs)
John L. Cooper (Counsel for Appellees/Plaintiffs)
Copart, Inc.
Cravath, Swaine & Moore
(Counsel for Appellants/Defendants)
The Cypress Group, Inc. (Appellant/Defendant)
Paul M. Dodyk (Counsel for Appellants/Defendants)
Farella Braun & Martel LLP
(Counsel for Appellees/Plaintiffs)
Neil A. Goteiner (Counsel for Appellees/Plaintiffs)
James Grosfeld, individually and as Trustee of the Jason Grosfeld Trust (Appellant/Defendant)
Nancy Grosfeld (Defendant in Conveyance Litigation below)
Homer & Bonner (Counsel for Appellants/Defendants)
Honigman, Miller, Schwartz & Cohn
(Counsel for Corporate Defendants below)
International Precious Metals Corporation
(Appellant/Defendant)

Appendix N

Robert M. Jackson
(Counsel for Corporate Defendants below)
Martin I. Kaminsky (Counsel for Appellants/Defendants)
Karen P. Kimmey (Counsel for Appellees/Plaintiffs)
Jeffery R. Knight (Counsel for Appellants/Defendants)
Eric G. LIPOFF (Counsel for Appellees/Plaintiffs)
Edward T. McDermott (Counsel for Appellants/Defendants)
MultiVest, Inc. (Appellant/Defendant)
MultiVest Real Estate, Inc. (Appellant/Defendant)
Jeffrey P. Newman (Counsel for Appellees/Plaintiffs)
Pollack & Kaminsky (Counsel for Appellants/Defendants)
L. Louis Raring (Counsel for Appellees/Plaintiffs)
Raring & Lipoff (Counsel for Appellees/Plaintiffs)
S.S. Melbourne, Inc. (Appellant/Defendant)
Michael R. Siebecker (Counsel for Appellants/Defendants)
The Honorable Ursula Ungaro-Benages (Trial Judge below)
Steven C. Wasinger (Counsel for Corporate Defendants below)
William Waters (Appellee/Plaintiff, Class Representative)
C. Brandon Wisoff (Counsel for Appellees/Plaintiffs)

Appendix N

PLEASE TAKE NOTICE that before the Eleventh Circuit Court of Appeals, Elbert P. Tuttle Court of Appeals Building, 56 Forsyth Street, N.W., Atlanta, Georgia, 30303, plaintiffs-appellees ("plaintiffs") hereby move the Court pursuant to 11th Cir. R. 27-1 (c)(10) and (d), for permission to file the accompanying supplemental two page brief to address one of defendants-appellants' ("defendants") misstatements in which defendants claim that a declaration filed *after* the case was closed, was part of a motion before the district court. The misstatement is material to this Court's jurisdiction to hear this appeal. Plaintiffs previously asked defendants to correct this misstatement in their brief to obviate any further motion practice. Defendants declined to do so, declined to point out where they believed that plaintiffs were mistaken on the facts stated in plaintiffs' supplemental brief, and declined to consent to plaintiffs filing the supplemental brief.[1] Plaintiffs are therefore constrained to file this motion to correct defendants' misstatement.

Defendants agreed to settle this class action and that they would not object to a fee request of one-third of the total settlement fund plus expenses (Plaintiffs' Brief, pp.20-22 collecting record citations). Defendants did not take any issue when the district court stated on the record on March 31, 1997 that defendants had assured the court in chambers during preliminary approval discussions, and before the jury was dismissed, that: "a fee of one-third of the gross amount of the settlement fund would be well within the range of reasonable." (Plaintiffs' Brief, p. 28, quoting R132-1518 at 42:10-18).

---

1. *See* correspondence between parties' counsel, attached collectively as Exhibit A to the accompanying November 30, 1998 declaration of Neil A. Goteiner.

Appendix N

Defendants now in their Reply Brief repeatedly claim for the first time that they did deny the district court's March 31, 1997 in-court statement (Defendants' Reply Brief, pp.6, 22, 24,25-26). Defendants also claim that plaintiffs' assertion that defendants did not deny the court's statement, was "false." (Defendants' Reply Brief, p. 24). To support their claims, defendants quote what they characterize as their "promptly" filed declaration of Paul Dodyk, "in support of" defendants' Fed. R. Civ. P. 52(b) and 59(e) motion, filed on April 21, 1997. (Defendants' Reply Brief at pp. 6, 24).

The record, however, is that *defendants never suggested that the district court was incorrect until after the court closed the case.* Plaintiffs' Supplemental Brief demonstrates *specifically* that: (*a*) defendants did *not* file this quoted Dodyk declaration "in support of ," or in connection with, any motion, (*b*) defendants filed the quoted Dodyk declaration on *May 9, 1997*, not on April 21 (R35-1546) (defendants do not provide the date of the quoted declaration in their Reply Brief); and (*c*) defendants filed their quoted Dodyk declaration (dated May 8) *after* receiving the district court's May 8, 1997 *faxed* Order denying defendants' Rule 52/59(e) motion, and the district court's May 8, 1997 Order closing the case (R35-1544, R35-1545).

Plaintiffs' Supplemental Brief also demonstrates that Mr. Dodyk did serve and file before the case was closed a declaration in support of defendants' Rule 52(b)/59(e) motion, a declaration in which he also stated that he had reviewed the March 31 transcript. (R34-1532, ¶¶ 1,18). This April 24 Dodyk declaration, however, did *not* refer at all to the district court's March 31 statement, which defendants now say they denied.

Appendix N

The Court's clear understanding of what defendants told the district court before the jury was dismissed regarding defendants' support of plaintiffs' requested fee, and the related chronology of the district court's on-the-record statements and defendants' silence, is material to the Court's review of this appeal. Indeed, defendants have conceded that their response to the district court's March 31 statement, and their effort to demonstrate that that March 31 statement mischaracterized the record, is critical to their right even to be before this Court.[2]

Pursuant to 11th Cir. R. 27-1(a)(3), plaintiffs also refer the Court to: (1) defendants' prior September 9, 1998 motion to supplement the record with declarations of defendants' counsel, (2) this Court's October 6, 1998 Order instructing defendants *inter alia* not to include in the appeal materials outside of the district court record, and (3) the Court's November 4, 1998 Order *inter alia* striking appellants' October 13, 1998 corrected brief.[3] Contrary to their merits Reply Brief, defendants in their September 23, 1998 reply brief in support of their September 9 motion to supplement

---

2. Defendants acknowledge that silence in response to the district court's statement that they supported plaintiffs' fee request, would be: "an admission which is obviously highly prejudicial;" the "obvious effect of the court's statement is to undermine defendants' appellate position in a manner which is immune from effective appellate review." (Defendants' October 16 Opening Brief, at 31).

3. Also on November 4, the motions panel granted defendants' motion for a 7 page extension of page limitation for defendants' Reply Brief, resulting in defendants' 32 page, 11 point type, printed brief.

the record, attempted to explain why they should be allowed to file these declarations because defendants had *not* "litigated" below the district court's statement about defendants' support of plaintiffs' fees (*Id.* pp. 3-4). Defendants proceeded on September 23 to explain to the motions panel that since the district court's order of May 8, 1997: "*concluded* the district court's proceedings with respect to the amount of plaintiffs' counsel's fee, defendants *had no subsequent opportunity or reason* to address that issue further below." (*Id.* at 13, emphasis added). Similarly defendants in that same September 23 reply brief noted that: "the court's passing reference to the matter in the hearing of March 31, 1997 *merited no response* because that observation was irrelevant to the issue before the Court." (*Id.* at n.4, emphasis added).

And yet in their merits Reply Brief, defendants now claim that they did respond to the district court's March 31 statement as part of their April 21 motion, and now offer Mr. Dodyk's declaration filed on May 9, after the case closed, to support their claim.

Appendix N

CONCLUSION

Plaintiffs respectfully request that the Court grant this motion for leave to file a supplemental brief and that the Court accept the accompanying supplemental brief for filing.

Dated: November 30, 1998

Respectfully submitted,

NEIL A. GOTEINER
GARY S. ANDERSON
C. BRANDON WISOFF
KAREN P. KIMMEY
FARELLA BRAUN & MARTEL
235 Montgomery Street
San Francisco, CA 94104p
Telephone: (415) 954-4400

By: s/ Neil A. Goteiner
Neil A. Goteiner

Attorneys for Plaintiffs
WILLIAM WATERS and LINDA BARTHOLOMEW and those similarly situated

APPENDIX O — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING APPELLEES' MOTION TO FILE A SUPPLEMENTAL BRIEF DATED AND FILED DECEMBER 22, 1998

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 97-5074

WILLIAM WATERS; LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated,

Plaintiffs-Appellees,

versus

INTERNATIONAL PRECIOUS METALS CORPORATION; MULTIVEST INCORPORATED; *ET AL.*,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

ORDER:

Appellees' motion for leave to file a supplemental brief is DENIED.

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX P — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR WRIT OF MANDAMUS DATED AND FILED APRIL 17, 1996

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

IN RE:

JAMES GROSFELD,

Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Middle District of Florida

BEFORE: KRAVITCH, ANDERSON and BIRCH, Circuit Judges.

BY THE COURT:

Multivest, Inc. and International Precious Metals Corporation's "joinder" in the Petitioner Grosfeld's petition for writ of mandamus, construed as a motion to adopt this petition, is GRANTED.

Petitioner's petition for writ of mandamus is denied.

APPENDIX Q — EXCERPT FROM THE NATIONAL FUTURES ASSOCIATION MANUAL, VOLUME SIX, NUMBER TWO (AS OF JANUARY 1, 2000)

NATIONAL FUTURES ASSOCIATION MANUAL

VOLUME 6, NO. 2
(AS OF JANUARY 1, 2000)

NATIONAL FUTURES ASSOCIATION

200 W. Madison Street
Suite 1600
Chicago, IL 60606-3447
(312) 781-1300

120 Broadway
Suite 1125
New York, NY 10271
(212) 608-8660

Published by Available Business Group

©2000 by National Futures Association
All Rights Reserved. No part of this publication may be reproduced in any form or by any means without permission in writing from the copyright holder.
Printed in U.S.A.

Available Business Group
4141 South Peoria Street
Chicago, Illinois 60609
Telephone: (773) 247-4141
Fax: (773) 247-1313

* * *

Appendix Q

[¶9021] COMPLIANCE RULE 2-9: SUPERVISION OF TELEMARKETING ACTIVITY (Board of Directors, January 19, 1993; revised August 14, 1996; December 16, 1996 and March 10, 1998.)

INTERPRETIVE NOTICE

Over the years, NFA's Board of Directors has adopted strict and effective rules to prohibit deceptive sales practices, and those rules have been vigorously enforced by NFA's Business Conduct Committees. The Board notes, however, that by their very nature, enforcement actions occur after the customer abuse has taken place. The Board recognizes that NFA's goal must be not only to punish such deception of customers through enforcement actions but to prevent it, or minimize its likelihood, through fair and effective regulation.

One NFA rule designed to prevent abusive sales practices is NFA Compliance Rule 2-9. This rule places a continuing responsibility on every Member to supervise diligently its employees and agents in all aspects of their futures activities, including telemarketing. Although NFA has not attempted to prescribe a set of supervisory procedures to be followed by all NFA Members, NFA's Board of Directors believes that Member firms which are identified as having a sales force that has received questionable training in sales practices should be required to adopt specific supervisory procedures designed to prevent sales practice abuse. Rule 2-9 authorizes the Board of Directors to require Members, which meet certain criteria established by the Board, to adopt specific supervisory procedures designed to prevent abusive sales practices.

Appendix Q

The Board believes that in order for the criteria used to identify firms subject to the enhanced supervisory requirements to be useful, those criteria must be specific, objective and readily measurable. The Board also believes that any supervisory requirements imposed on a Member must be designed to quickly identify potential problem areas so that the Member will be able to take corrective action before any customer abuse occurs. The purpose of this Interpretive Notice is to set forth the criteria established by the Board and the enhanced supervisory procedures which are required of firms meeting these criteria.

In developing the criteria, the Board concluded that it would be helpful to review Member firms which had been closed through enforcement actions taken by the CFTC or NFA for deceptive sales practices. The Board's purpose was to identify factors common to these Member firms and probative of their sales practice problems, which could be used to identify other Member firms with potential sales practice problems.

One factor identified by the Board as common to these firms and directly related to their sales practice problems is the employment history and training of their sales forces. For many of these Members, a significant portion of their sales force was previously employed and trained by one or more of the other Member firms closed for fraud. The Board believes that the employment history of a Member's sales force is a relevant factor to consider in identifying firms with potential sales practice problems. If a Member firm is closed for fraud related to widespread telemarketing problems, it is reasonable to conclude that the Member's training and

supervision of its sales force was wholly inadequate or inappropriate. It is also reasonable to conclude that an AP who received inadequate or inappropriate training and supervision may have learned improper sales tactics, which he will carry with him to his next job. Therefore, the Board believes that a Member firm employing such a sales force must have stringent supervision procedures in place in order to ensure that the improper training its APs have previously received does not taint their sales efforts on behalf of the Member.

The Board has determined that a Member will be required to adopt the specific supervisory procedures over its telemarketing activities if:

- for firms with at least five but less than 10 APs, 40 percent or more of its APs have been employed by one or more Member firms which have been disciplined by NFA or the CFTC for sales practice fraud ("Disciplined Firms");

- for firms with at least 10 but less than 20 APs, four or more of its APs have been employed by one or more Disciplined Firms; or

- for firms with at least 20 APs, 20 percent or more of its APs have been employed by one or more Disciplined Firms.

For purposes of this requirement, a Disciplined Firm is defined very narrowly to include only those firms that meet the following three criteria:

1. the firm has been formally charged by either the CFTC or NFA with deceptive telemarketing practices;

2. those charges have been resolved; and

3. the firm has been closed down and permanently barred from the industry as a result of those charges.

Attached is a list of firms currently meeting the definition of a Disciplined Firm. Although this list is current as of the date of this Interpretive Notice, NFA will provide Members with updated lists as necessary.

Any Member firm meeting these criteria will be required either to operate pursuant to a guarantee agreement or maintain an adjusted net capital of at least $250,000 for the entire period during which the Member is required to tape record its sales solicitations. Any Member opting to maintain the higher level of adjusted net capital would also be subject to the financial recordkeeping and reporting requirements applicable to FCMs. Eligible guarantor futures commission merchants are those that meet the eligibility requirements for executing a Supplemental Guarantor Certification Statement pursuant to NFA Registration Rule 504(a)(2)(B).

Those Members meeting the criteria will be required to tape record all telephone conversations that occur between their APs and both existing and potential customers. The Board believes that tape recording these conversations provides these Members with the best opportunity to monitor closely the activities of their APs and also provides these

Appendix Q

Members with complete and immediate feedback on each AP's method of soliciting customers. Members meeting the criteria must tape record these conversations for a period of two years and must retain such tapes for a period of five years from the date each tape is created and the tapes shall be readily accessible during the first two years of the five-year period. In retaining the tape recorded conversations, Member firms must catalog the tapes by AP and date. Additionally, any Member firm meeting the criteria must require all its APs to maintain a daily log for sales solicitations which reflects at a minimum the identity of each customer or prospective customer the AP spoke with on each day. A Member firm must be able to promptly produce, upon request from NFA or the CFTC, all conversations relating to a specific AP, and only that AP, for a given date.

In addition, for a period of two years, those Members meeting the criteria will be required to file all promotional material, as defined in NFA Compliance Rule 2-29(g), with NFA at least 10 days prior to its first use.

If an NFA Business Conduct Committee disciplinary proceeding or Commodity Futures Trading Commission enforcement proceeding has been filed against a Member firm required to adopt these enhanced supervisory procedures, then the enhanced supervisory procedures will remain in effect for the applicable time period specified or until after the disciplinary or enforcement proceeding is closed and all appeals are completed or the time for appeal has passed without an appeal being filed or perfected, whichever occurs latest. Member firms shall be required to retain tapes for the five-year period as specified above.

Appendix Q

Any Member required to adopt these enhanced procedures may seek a waiver of the enhanced supervisory requirements. NFA may grant such a waiver upon a satisfactory showing that the Member's current supervisory procedures provide effective supervision over its employees, including enabling the Member to identify potential problem areas before customer abuse occurs.

A Member firm that does not comply with this Interpretive Notice will violate NFA Compliance Rule 2-9 and will be subject to disciplinary action.

FIRMS THAT HAVE BEEN DISCIPLINED FOR SALES PRACTICE FRAUD

1st Commodity Corp. of the Carolinas
Alpine Financial Corp.
American Futures Group Inc.
Apache Trading Corp.
Arnekay Inc.
Atlantic Futures Inc.
Atlantic Mercantile Group Inc.
Bear & Wolf Company, Inc.
BP Financial of Boston Inc.
Bachus & Stratton Commodities, Inc.
Carrington Financial Corp.
Chicago Commodity Corp.
Chilmark Commodities Corp.
Churchill Group Inc.
Commodity Fluctuations Systems Inc.
Commonwealth Financial Group Inc.
Diversified Trading Systems Inc.

Appendix Q

Dunhill Investments Corporation
Durkin & Associates Inc.
England, Mark W.
Financial Services Group Inc.
First Commodity Corporation of Boston
First National Monetary Corp.
First Sierra Corporation
Futures Financial Advisors of Palm Beach
Gabriel Brokerage Inc.
Gemini Investments Inc.
Grandview Holding Corp.
Great American Commodities Corp.
Index Services Inc.
International Futures Strategists, Inc.
International Trading Group Ltd.
Investment Syndication Corp.
JCC Inc.
Jones Commodities Inc. D.E.
Masters Trading Organization Ltd.
Montgomery International Trading Inc.
Multivest Options Inc.
Murlas Commodities Inc.
Nationwide Futures Corp.
Neiman-Lloyds Inc.
Option America Inc.
Preferred Commodity Corporation
Premex Inc.
Presidential Futures Inc.
Stephens E. David Commodities Corp.
Stirn, Barry Gerald
Tara Securities Corp.
Trinity Financial Group Inc.

Appendix Q

Waters Tan & Co. Inc.
Wellington Financial Group Inc.
Whitehall Investors International Inc.
Wolf Commodities Corp. Inc.
Zipkin, William L.

* * * *

MOTION FILED

APR 2 4 2000

(4)

No. 99-1560

IN THE

Supreme Court of the United States

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, individually and as Trustee of the JASON GROSFELD TRUST, MULTIVEST REAL ESTATE, INC., S.S. MELBOURNE, INC. and THE CYPRESS GROUP, INC.,

Petitioners,

v.

WILLIAM WATERS and LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* IN SUPPORT OF PETITION

STEVEN M. EDWARDS
Counsel of Record
JOHN A. REDMON
CHRISTOPHER B. WREN
HOGAN & HARTSON L.L.P.
Attorneys for Amici Curiae
100 Park Avenue
New York, NY 10017
(212) 685-8000

159279

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

26pp

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2, Amici Curiae move for leave to file the attached brief in support of the Petition. Petitioners have consented to the filing of this brief. Counsel for Respondents have not consented, necessitating this motion.

Amici are a group of law professors who have particular expertise in class actions and the award of fees in class actions. They are concerned about recent decisions that award attorneys' fees on the basis of the nominal amount of reversionary settlement funds without regard to the actual recovery by the class. This has the effect of awarding a disproportionate amount of the recovery to class counsel at the expense of the class, and it creates disturbing conflicts between the interests of class counsel and the interests of the class.

The Amici believe they are uniquely situated to address the practical and policy implications of the decisions below. A review of the Petition and the briefs in the Eleventh Circuit suggests that this was a hard fought and contentious controversy. In the annexed brief in support of the Petition, Amici attempt to isolate the critical legal issue that warrants review: Should a district court award attorneys' fees based on a percentage of the nominal amount of a settlement fund, where it is understood that a substantial amount of the fund will revert to the defendants, resulting in fees to class counsel that exceed the recovery of the class, or should a court be required to take the actual recovery rate into account in determining a reasonable fee?

Although the district court understood that the number of class members actually asserting claims would be significantly lower than the class membership, it did not take that into account in determining a reasonable fee because it understood that a prior decision of this Court prohibited it from doing so. The Eleventh Circuit affirmed and, as a result, class counsel obtained a fee that was more than 200% of the actual class distribution. The AARP was permitted to file a brief amicus curiae supporting the position of class counsel in the Eleventh Circuit, but class counsel has refused to consent here.

Amici believe the Court would benefit from the attached brief and respectfully request that the Court grant this motion for leave to file it.

Respectfully submitted,

STEVEN M. EDWARDS
Counsel of Record
JOHN A. REDMON
CHRISTOPHER B. WREN
HOGAN & HARTSON L.L.P.
100 Park Avenue
New York, NY 10017
(212) 685-8000

On Behalf of Amici:

LESTER BRICKMAN
GEORGE COHEN
MERRITT FOX
SUSAN KONIAK
THOMAS ROWE

QUESTION PRESENTED

Amici Curiae will address the following question:

Did the district court err, as a matter of law, by awarding attorneys' fees in connection with the settlement of a class action for money damages without determining whether those fees bore a reasonable relationship to the recovery actually paid to class members?

TABLE OF CONTENTS

	Page
Question Presented	i
Table Of Contents	ii
Table Of Cited Authorities	iv
Statement Of Interest Of Amici Curiae	1
Statement Of The Case	1
Summary Of Argument	2
Argument	5
The District Court Erroneously Failed To Consider Whether The Attorneys' Fees Awarded To Class Counsel Bore A Reasonable Relationship To The Recovery Actually Paid To The Class	5
A. Awarding Attorneys' Fees to Class Counsel Based on the Nominal Amount of a Reversionary Settlement Fund Enables Class Counsel to Appropriate a Disproportionate Amount of Available Settlement Funds for Themselves.	5
B. Awarding Attorneys' Fees to Class Counsel Based on the Nominal Amount of the Reversionary Settlement Fund Undermines the Public Policies Supporting Damages Class Actions.	11

Contents

	Page
C. *Boeing v. Van Gemert* is Not Inconsistent With the Rule Advocated Here.	13
D. There is No Reason Why Courts Cannot Base Fee Awards on the Actual or Anticipated Recovery of the Class. ...	15
Conclusion	17

TABLE OF CITED AUTHORITIES

Page

Cases:

Blum v. Stenson, 465 U.S. 886 (1984) 11

Boeing v. Van Gemert, 444 U.S. 472 (1980) 4, 13, 14, 15

City of Detroit v. Grinnell Corp., 495 F.2d 448 (1974) 13

Goldberger v. Integrated Resources, __ F.3d __, 2000 WL 320447 (2d Cir. March 28, 2000) 6, 9

In re Activision Securities Litigation, 723 F. Supp. 1373 (N.D. Cal. 1989) 9

In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768 (3d Cir. 1995) 7

In re Pacific Enters, Litig., 47 F.3d 373 (9th Cir. 1995) 12

In re Quantum Health Resources, Inc. Securities Litigation, 962 F. Supp. 1254 (C.D. Cal. 1997) . 9

Kamilewicz v. Bank of Boston Corp., 100 F.3d 1348 (7th Cir. 1996) 9

Malchman v. Davis, 761 F.2d 893 (2d Cir. 1985) ... 9

Cited Authorities

	Page
Piambino v. Bailey, 610 F.2d 1306 (5th Cir. 1980) . .	8
Piambino v. Bailey, 757 F.2d 1112 (11th Cir. 1985), *cert. denied*, 476 U.S. 1169	12
Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977)	7
Strong v. BellSouth Telecommunications, Inc., 137 F.3d 844 (5th Cir. 1998)	7, 9, 12, 14
Swedish Hospital Corp. v. Shalala, 1 F.3d 1261 (D.C. Cir. 1993)	9
Weinberger v. Great Northern Nekoosa Corp., 925 F.2d 518 (1st Cir. 1991)	7, 9
Williams v. MGM-Pathe Communications Co., 129 F.3d 1026 (9th Cir. 1997)	14
Statutes:	
15 U.S.C. § 77z-1(a)(6)	10
42 U.S.C. § 1988	11
Rule:	
Fed. R. Civ. P. 23(e)	8

Cited Authorities

Page

Other Authorities:

Alexander, J.C., *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497 (1991) 12

Court Awarded Attorney Fees, Report of the Third Circuit Task Force, 108 F.R.D. 237 (1985) 7

Macey, J.R. & Miller, G.P., *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation*: Economic Analysis and Recommendations for Reform, 58 Univ. Chi. L. Rev. 1 (1991) 9

Newberg, H.B. & Conte, A., *Newberg on Class Actions* (3d ed. 1992) 14

Rand Institute for Civil Justice, *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, Executive Summary (1999) 11

STATEMENT OF INTEREST OF AMICI CURIAE

Amici Lester Brickman, George Cohen, Merritt Fox, Susan Koniak and Thomas Rowe are law professors at the law schools, respectively, of The Benjamin Cardozo School of Law of Yeshiva University, The University of Virginia, The University of Michigan, Boston University and Duke University.[1] The Amici have, variously, taught, studied and published articles relating to the issues raised by the Petition, and all are concerned with the current state of the law — as evidenced by the decision below — which permits, and even encourages, class counsel to appropriate for themselves a disproportionate share of the funds available for the settlement of damages class actions, and to bargain away the rights of their clients in exchange for attorneys' fees that are disproportionately high in relation to any benefits conferred on the class.

STATEMENT OF THE CASE

The elements of this case that are relevant to the interests of the Amici include the following: (1) the district court awarded class counsel $13.3 million in attorneys' fees — a sum which is more than 200% of the amount actually distributed to the class; (2) the district court awarded this amount on the basis of an illusory $40 million "reversionary" settlement fund, from which it calculated a fee based on 33-1/3% of that amount; (3) of this fund, only $6.5 million

---

1. Pursuant to Supreme Court Rule 37.6, the Amici state that this brief was authored by them and counsel listed on the front cover hereof, and was not authored in whole or in part by counsel for a party. No one other than the Amici and their counsel made any monetary contribution to the preparation or submission of this brief.

was actually paid out to the class, and roughly 50% of the fund will revert to defendants; and (4) the effect of basing a fee award on the nominal amount of a reversionary fund was to enable class counsel to appropriate as fees roughly two-thirds of the money available for settlement.

The Amici believe it is important for the Court to consider these issues in the context of the present Petition because it may not have an opportunity to do so in the future. In most cases, the defendants are precluded from raising these issues by a "clear sailing" agreement which prohibits them from challenging the fee award, and it is extremely rare for class plaintiffs to take the fee issue up on appeal. In this case, defendants challenged the fee application, and the district court and court of appeals determined the issues raised by the Petition — albeit erroneously — on the merits.

SUMMARY OF ARGUMENT

This case provides a rare glimpse into a significant problem that often occurs when attorneys' fees are awarded in class actions involving "reversionary" settlement funds, and it presents a unique opportunity for the Court to correct that problem. The district court in this case — basing its decision solely on the nominal amount of a reversionary fund — awarded counsel for the plaintiff class a fee exceeding 200% of the amount actually paid to the class itself. While the district court indicated that it understood that the number of class members actually asserting claims would be lower than the class membership, it explicitly discounted that factor, stating that "the appropriate benchmark is necessarily a percentage of the gross judgment amount. . . ." (Appendix S at S-2.)

The Amici believe that a rule permitting plaintiffs' counsel in damages class actions to recover attorneys' fees based solely on the nominal amount of a reversionary fund — without any consideration of the amount actually recovered by the class — is undesirable for several important reasons.

First, it disassociates the pecuniary interests of class counsel from those of their clients and creates an enormous incentive for class counsel to bargain away the rights of class members in exchange for a defendant's agreement to acquiesce (*e.g.*, through a "clear sailing" agreement) in various devices designed to increase class counsel's share of the moneys available for settlement.

Second, it results in a misallocation of money to attorneys' fees which should be dedicated to compensating class members for the actionable injuries which are the subject of the class action.

Third, to the extent that class actions are designed to deter socially undesirable conduct, it blunts that deterrent effect by giving defendants a mechanism by which they can "buy off" class counsel.

Fourth, it tends to cast the courts and legal profession in a bad light by enhancing the perception that class actions are a socially undesirable mechanism by which attorneys unjustly enrich themselves.

The Amici advocate a rule requiring that district courts, in awarding attorneys' fees in connection with the settlement of class actions for damages, explicitly determine that there is a reasonable relationship between the fee awarded and

the amounts actually recovered by the class. Moreover, absent unusual circumstances, the amount of the fee should not exceed the actual or anticipated recovery.[2] This rule would properly align the pecuniary interests of class counsel with those of the class, and — while offering ample incentives to class counsel — would reduce the likelihood that counsel can obtain windfall fees.

The Amici do not believe this rule is foreclosed by the Court's decision in *Boeing v. Van Gemert*, 444 U.S. 472 (1980), which involved facts quite different from those here. Because *Boeing* has been misinterpreted by some courts to *require* that class counsel's fees be based on the total amount of reversionary funds, however, the Court should take this opportunity to clarify *Boeing*. To the extent that *Boeing* is inconsistent with the position advocated here, it should be reconsidered.

---

2. Amici express no view with respect to the merits of this case. Nor do they express any view as to whether unusual circumstances are presented here. Plaintiffs' counsel apparently contended that a fee based on time actually spent would approximate $12.6 million, but they did not submit actual time records and the district court made no findings with respect to a lodestar amount. (*See* Appendices C, D, E and S.) Moreover, the Eleventh Circuit has ruled that a lodestar calculation is not proper in common fund cases (Appendix A at A-13), suggesting a policy in favor of limiting attorneys' fees to a percentage of the common fund. These are issues that would necessarily be addressed by the courts below on remand.

ARGUMENT

THE DISTRICT COURT ERRONEOUSLY FAILED TO CONSIDER WHETHER THE ATTORNEYS' FEES AWARDED TO CLASS COUNSEL BORE A REASONABLE RELATIONSHIP TO THE RECOVERY ACTUALLY PAID TO THE CLASS

A. Awarding Attorneys' Fees to Class Counsel Based on the Nominal Amount of a Reversionary Settlement Fund Enables Class Counsel to Appropriate a Disproportionate Amount of Available Settlement Funds for Themselves.

Class counsel in the present case received a fee that was roughly 200% of the amount actually paid out to the class. This was accomplished by establishing a large — but essentially illusory — "reversionary" fund; applying a 33-1/3% contingency to that artificially inflated amount; and paying the resulting fee "off the top" of the reversionary fund to class counsel. The remainder of the reversionary fund was then made available to class members who filed qualifying claims, and the requirements for filing such claims were quite stringent.

As is commonly known from experience with such arrangements, and as the parties doubtless expected, only a fraction of the class members actually filed qualifying claims. Indeed, only 17% of the parties' "reversionary" fund was actually paid out to the class. The remainder, after deducting attorneys' fees, "reverted" to defendants, as was also doubtless anticipated by both defendants and class counsel.

The net result was that, in a case in which defendants paid $20 million (in non-imaginary dollars) to settle, class counsel

walked away with $13.3 million of that amount (or approximately two-thirds) and the class members received $6.5 million (or approximately one-third).

The anomalies associated with basing attorneys' fees on the nominal amount of reversionary funds are illustrated in a chart set forth in the Petition at page 15. That chart demonstrates that, if the actual recovery rate in a reversionary settlement is ignored, the attorneys' fees can range from $3.3 million to $13.3 million — depending on whether the reversionary or pro rata method is used. That range of potential outcomes, especially when viewed in relation to the benefits achieved for individual class members and the overall costs of dispute resolution, is too wide for all of those methods to be viewed as reasonable.

Petitioners' chart also demonstrates that, in a world in which courts may consider it "reasonable" for class counsel to recover a fee of either $3.3 million or $13.3 million for achieving exactly the same actual recovery for the class, class counsel will inevitably be inclined to use all means at its disposal to obtain the higher fee. Given that defendants in class actions are generally concerned only with the total amount that they must pay out in settlement and are otherwise indifferent to how that settlement amount is allocated between the class and its counsel, the resulting situation is rife with the potential for class counsel to bargain away the rights of the class in exchange for defendants' acquiescence in the largest possible allocation of available settlement money to attorneys' fees.[3] Such conflicts of interest can manifest themselves in several obvious ways. -

---

3. Numerous courts have commented on similar conflicts of interest in this context. *See, e.g., Goldberger v. Integrated Resources*, __ F.3d __, __, 2000 WL 320447 at *10 (2d Cir. March 28, 2000) ("Defendants, once the settlement amount has been agreed to, have (Cont'd)

First, the use of a fee calculation based on the total amount of a reversionary fund, without regard to the actual recovery rate, dulls class counsel's incentive to seek the maximum actual recovery for the class. If class counsel were limited to a fee based on the amounts actually recovered by the class, it could not obtain a $13.3 million fee unless $40 million were actually paid out to the class. With the settlement structure adopted here, however, class counsel has little incentive to seek the additional $20 million for the class, because its fee will remain the same whether or not the class collects $20 million or $40 million. Defendants' counsel, by the same token, have every incentive to agree to a "reversionary" structure, because experience teaches that a significant portion of the reversionary fund will not be claimed. Thus, defendants' willingness to pay more than $20 million in a pro rata settlement is never really tested in the negotiations.

(Cont'd)

little interest in how it is distributed, and thus no incentive to oppose the fee. . . . th[is] same dynamic creates incentives for collusion"); *Strong v. BellSouth Telecommunications, Inc.*, 137 F.3d 844, 849-50 (5th Cir. 1998); *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 819-20 (3d Cir. 1995) ("defendant is interested only in disposing of the total claim asserted against it" and "the allocation between the class payment and the attorneys' fees is of little or no interest to the defense"); *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991) (noting the "danger [ ] that the lawyers [paid separately by defendants] might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red carpet treatment on fees"); *Prandini v. National Tea Co.*, 557 F.2d 1015, 1020 (3d Cir. 1977). *See generally Court Awarded Attorney Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 266 (1985).

Second, class counsel is also indifferent to the burden of proof imposed on class members in the procedures established for making claims against the reversionary fund, because its fee comes off the top and is based on the gross amount of the fund. Defendants, on the other hand, care deeply about the claims process, because the more stringent the procedures, the greater the amount that will revert to defendants.[4] Accordingly, class counsel has a clear incentive to trade off strict claims procedures, which cost class counsel nothing — such as short deadlines, burdensome forms or elaborate documentation requirements — for a larger share of the settlement "pie".

Third, class counsel has an incentive to agree to a non-monetary recovery for the class, such as coupons, where some of the worst abuses have occurred. Where settlements are not in the form of cash, class members are less likely to file claims. Since the value of the settlement fund is nevertheless calculated based on the putative value of non-cash consideration, class counsel's fees are not affected, even though such a settlement is clearly less beneficial to the class.

While district courts are required to approve class action settlement agreements (Fed. R. Civ. P. 23(e)), and while an assessment of the reasonableness of such fees is a necessary part of such approval,[5] it is quite difficult for courts to

---

4. Defendants will always have an incentive to advocate stringent procedures. The problem is that, under the current rule, class counsel has little incentive to oppose that. To the extent that defendants engage in inappropriate delaying tactics, district courts are equipped to deal with that.

5. *See, e.g., Piambino v. Bailey*, 610 F.2d 1306, 1328 (5th Cir. 1980).

perform that assessment effectively. By the time the parties make their joint submissions to the court, the adversarial process has been suspended, with both sides supporting the settlement.[6] The problem is then exacerbated by the use of "clear sailing" agreements, in which defense counsel agree not to oppose class counsel's fee application.[7] As a result, courts often lack the information necessary to protect the

---

6. Many courts have commented on the difficulty of assessing the reasonableness of class counsel's fees due to the lack of an adversarial process. *Goldberger*, __ F.3d at __, 2000 WL 320447 at *10 ("fixing a reasonable fee becomes [ ] difficult because the adversary system is typically diluted — indeed, suspended — during fee proceedings"); *see, e.g.*, *Strong*, 137 F.3d at 849-50; *Swedish Hospital Corp. v. Shalala*, 1 F.3d 1261, 1269 (D.C. Cir. 1993); *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1352 (7th Cir. 1996) (Easterbrook, J. dissenting from denial of rehearing en banc); *In re Quantum Health Resources, Inc. Securities Litigation*, 962 F. Supp. 1254, 1256 (C.D. Cal. 1997) ("the court is abandoned by the adversary system and left to the plaintiff's unilateral application and the judge's own good conscience" (*quoting In re Activision Securities Litigation*, 723 F. Supp. 1373, 1374 (N.D. Cal. 1989)). *See also* J.R. Macey & G.P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation*: Economic Analysis and Recommendations for Reform, 58 Univ. Chi. L. Rev. 1, 46 (1991) (settlement hearings compared to "pep rallies jointly orchestrated by plaintiffs' counsel and defense counsel").

7. As several courts have noted, such "clear sailing" agreements — which are designed primarily to protect class counsel's fee arrangements from judicial scrutiny — are likely to be bought and paid for with the rights of the class members. *Malchman v. Davis*, 761 F.2d 893, 908 (2d Cir. 1985) (Newman, J. concurring) ("It is unlikely that a defendant will gratuitously accede to the plaintiffs request for a 'clear sailing' clause without obtaining something in return. That something will normally be at the expense of the plaintiff class."); *Weinberger*, 925 F.2d at 525.

interests of the class against the conflicts inherent in the settlement process.

Because the district courts are, in this context, effectively deprived of the adversary process, the best (and possibly the only) way to ensure that the interests of absentee class members will not be sacrificed in arrangements between class counsel and defendants is to align the interests of class counsel and the class as closely as possible. In class actions seeking money damages, the most direct means of achieving that is to require that attorneys' fees be based on monies actually paid out to the class.

In the context of settlements of securities class actions (which, of course, are closely analogous to the present case), Congress has recently arrived at this same conclusion. The Private Securities Litigation Reform Act requires that total attorneys' fees and expenses not exceed "a reasonable percentage of the amount of any damages and prejudgment interest *actually paid* to the class". 15 U.S.C. § 77z-1(a)(6) (emphasis added). Although this provision does not apply in the present case, the policies which it represents are fully applicable here, and Congress's adoption of this provision lends substantial support to the position of the Amici.

B. Awarding Attorneys' Fees to Class Counsel Based on the Nominal Amount of the Reversionary Settlement Fund Undermines the Public Policies Supporting Damages Class Actions.

A recent study of damages class actions by the Rand Institute for Civil Justice has concluded that:

> The single most important action that judges can take to support the public goals of class action litigation is to reward class action attorneys only for lawsuits that actually accomplish something of value to class members and society.[8]

Accordingly, the Rand Study places at the top of its list of things judges should do "[t]o avoid rewarding class action attorneys for dubious accomplishments" the recommendation that the district courts should "award fees in the form of a percentage of the fund *actually disbursed* to class members or other beneficiaries of the litigation." *Id.* at 33-34 (emphasis in the original).

In the present case — an action against a commodities brokerage firm seeking money damages based on "churning" allegations — the "value" conferred on class members can only be measured in terms of the amount of money recovered by class members.[9] Where counsel obtains a fee which is

8. Rand Institute for Civil Justice, *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, Executive Summary at 33 (1999) (hereafter "Rand Study").

9. Obviously, the rule advocated by the Amici would not be appropriate in cases where an injunction is sought or in civil rights cases, which raise special considerations and which are generally controlled by 42 U.S.C. § 1988. *See Blum v. Stenson*, 465 U.S. 886 (1984).

200% of the amount recovered by the class, counsel has been overcompensated relative to any benefits obtained for the class.[10]

Such overcompensation of class counsel, as the Rand Study suggests, undermines "the public goals of class action litigation", for several reasons. First, to the very significant extent that the purpose of a class action is to compensate the class for injuries suffered due to actionable conduct, it is clearly inconsistent to allow class counsel to siphon off (in this case) two-thirds of the money available for compensation of the class. Where that is permitted to happen, the class will be undercompensated.[11]

---

10. While it is probably impossible to set a "one size fits all", *per se* reasonable level of compensation, it seems axiomatic that, in cases like the present, class counsel should not receive a fee which is larger than the aggregate class recovery (much less twice as large). A study conducted by the National Economic Research Associates ("NERA") shows that — out of a sample of 29 securities class actions settled in the Eleventh Circuit — no court awarded fees exceeding 50% of the amount actually distributed to the class. Denise M. Martin, NERA, Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions (November 1996) (*See* Appendices K-M to the Petition.) *See also In re Pacific Enters, Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) ("Twenty-five percent is the benchmark that district courts should award in common fund cases.")

11. *See, e.g., Strong*, 137 F.3d at 849 (In examining class counsel's fees, the court must guard "against the public perception that attorneys exploit the class action device to obtain large fees at the expense of the class"); *Piambino v. Bailey*, 757 F.2d 1112, 1143-44 (11th Cir. 1985), *cert. denied*, 476 U.S. 1169. *See also* Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497 (1991).

Second, to the extent that class actions are designed to encourage "private attorneys general" to achieve regulatory objectives, the practice of basing attorneys' fees on the nominal amount of reversionary settlement funds may encourage attorneys to settle for less than they otherwise might obtain. As Petitioners' chart demonstrates, reversionary settlements are clearly cheaper for defendants. Obviously, the less the defendant has to pay to settle a class action, the less the deterrent effect.[12]

Finally, courts have often commented on the fact that — where class counsel receives fees disproportionate to any benefits conferred on the class — both the courts and the legal profession are cast in a bad light.[13]

C. *Boeing v. Van Gemert* is Not Inconsistent With the Rule Advocated Here.

Contrary to the views expressed by some courts and commentators,[14] *Boeing v. Van Gemert*, 444 U.S. 472 (1980)

---

12. The Amici take no position in this brief with respect to the propriety of reversionary settlements.

13. For example, the Second Circuit, in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 469-70 (1974), stressed that the district courts should "suit the award of the fees to the performance of individual counsel in light of the size of the settlement" and that "[f]or the sake of their own integrity, the integrity of the legal profession, and the integrity of Rule 23, it is important that the courts should avoid awarding 'windfall fees' ".

14. The Ninth Circuit, relying on *Boeing*, has held that a district court "abused its discretion by basing [class counsel's] fee on the (Cont'd)

does not preclude the rule advocated by the Amici here. Indeed, *Boeing* did not really deal with the issue here at all. The issue in *Boeing* was whether the "American Rule" against fee shifting barred taxing a portion of the attorneys' fees awarded against a portion of a common fund which had not been claimed by the class. The Court — without determining the amount of the attorneys' fees that should be awarded — held that the American Rule did not bar the fee award by the courts below. 444 U.S. at 478-81.

The critical distinction is that *Boeing* did not involve a settlement. In *Boeing*, class counsel had obtained a judgment and the amount of the fee had been determined. The only question was whether the fee should be borne by class members who filed claims or by the entire class. As the Second Circuit pointed out in deciding that the fee should be deducted from the total recovery, "deducting attorneys' fees only from the claimed portion of the judgment may leave each plaintiff bereft of benefits". 590 F.2d 433, 441 (2d Cir. 1978).

Here, by contrast, the amount of the fee was determined as a result of a negotiated settlement, and class counsel faced

---

(Cont'd)
class members' claims against the fund rather than on a percentage of the entire fund or on the lodestar". *Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997); *Newberg on Class Actions* § 14.03 at 14-14 (3d ed. 1992) ("In *Boeing v. Van Gemert*, the Supreme Court . . . [ruled] that class counsel are entitled to a reasonable fee based on the funds potentially available to be claimed, regardless of the amount actually claimed.") *Compare Strong*, 137 F.3d at 852 (distinguishing *Boeing* and affirming the district court's conclusion that the "common fund" claimed by class counsel was a "phantom" and should not serve as the basis for a fee award.)

an inherent conflict in trading off its own interests with those of the class. In *Boeing*, the Court explicitly reserved on the issue of "whether a class-action judgment that simply requires the defendant to give security against all potential claims would support a recovery of attorneys' fees under the common fund doctrine." 444 U.S. at 481, n.5. This case presents the issue left open in *Boeing*.

As the petition demonstrates, there is a clear conflict among the Circuits in interpreting *Boeing*. For that reason, it is important for the Court to clarify or reconsider that decision. A rule that permits district courts to award fees that are more than 200% of the class recovery, and provides incentives for class counsel to favor their own interests over those of their clients, is untenable.

D. There is No Reason Why Courts Cannot Base Fee Awards on the Actual or Anticipated Recovery of the Class.

While the award of attorneys' fees to class counsel based on the total amount of a reversionary settlement fund has the attraction of being easy to administer, there are numerous approaches courts could take in an effort to base fee awards on the actual recovery of a class. One approach would be to defer the award of attorneys' fees until all claims have been processed or to award attorneys' fees in stages as claims come in. It would also be possible to structure the fee award to provide a substantial initial payment, based on anticipated recovery rates, with further payments based on actual results. Yet another method would be to award fees and then require a refund, with interest, if the recovery rate is less than anticipated.

A district court could also base an award on the anticipated recovery of the class. There are studies of recovery rates under various circumstances that could be considered by the courts. In addition, courts could hear expert testimony on the likely rate of recovery, compared to the baseline suggested by various studies, given such factors as the amount of each individual claim, the consideration to be paid (*e.g.*, cash or coupons) and the difficulty of the claims procedure.

Amici are not in agreement on the best or proper approach (and some affirmatively disagree with one or more of these approaches). All agree, however, that any of these approaches would more closely align the interests of class counsel with those of the class. All agree, moreover, that the approach taken by the district court in this case — basing the award on the gross amount of a reversionary fund without regard to the actual or anticipated recovery rate — was incorrect.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

STEVEN M. EDWARDS
Counsel of Record
JOHN A. REDMON
CHRISTOPHER B. WREN
HOGAN & HARTSON L.L.P.
100 Park Avenue
New York, NY 10017
(212) 685-8000

On Behalf of Amici:

LESTER BRICKMAN
GEORGE COHEN
MERRITT FOX
SUSAN KONIAK
THOMAS ROWE

(5)

No. 99-1560

Supreme Court, U.S.
FILED
MAY 8 - 2000
CLERK

IN THE
Supreme Court of the United States

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, INDIVIDUALLY AND AS TRUSTEE OF THE JASON GROSFELD TRUST, MULTIVEST REAL ESTATE, INC., S.S. MELBOURNE, INC., AND THE CYPRESS GROUP, INC.,

Petitioners,

v.

WILLIAM WATERS AND LINDA BARTHOLOMEW, INDIVIDUALLY AND ON BEHALF OF ALL THOSE SIMILARLY SITUATED,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

PAUL M. DODYK
Counsel of Record

CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
Telephone: (212) 474-1000
Facsimile: (212) 474-3700

R. Lawrence Bonner
HOMER, BONNER & DELGADO, P.A.
100 S.E. Second Street
Miami, FL 33131
Telephone: (305) 350-5100
Facsimile: (305) 379-0918

Martin I. Kaminsky
POLLACK & KAMINSKY
114 West 47th Street
New York, NY 10036
Telephone: (212) 575-4700
Facsimile: (212) 575-6560

Attorneys for Petitioners

May 8, 2000

HPP

CORPORATE DISCLOSURE STATEMENT IN ACCORDANCE WITH RULE 29.6 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

The corporate disclosure statement at p. ii of Petitioners' Petition for Writ of Certiorari dated March 22, 2000 is still accurate.

TABLE OF CONTENTS

		Page
CORPORATE DISCLOSURE STATEMENT		i
TABLE OF AUTHORITIES		iii
I.	The Court should grant certiorari to eliminate the manipulation of reversionary settlements to enrich class counsel at the expense of their clients	1
II.	This Court should grant certiorari to resolve conflicting interpretations of *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980), which have led to conflicts below	4
III.	Respondents have offered no acceptable reasons for this Court to deny certiorari	6

TABLE OF AUTHORITIES

Cases	**Page(s)**
Boeing Co. v. Van Gemert, 444 U.S. 472, 100 S.Ct. 745 (1980)	4, 5
Goldberger v. Integrated Resources, Inc., 2000 WL 320447 (2d Cir. March 28, 2000)	7
Malchman v. Davis, 761 F.2d 893 (2d Cir. 1985)	9
Strong v. BellSouth Telecomm., Inc., 137 F.3d 844 (5th Cir. 1998)	5, 6
Waters v. International Precious Metals Corp., 190 F.3d 1291 (11th Cir. 1999)	2, 4, 5, 8
Weinberger v. Great Northern Nekoosa Corp., 925 F.2d 518 (1st Cir. 1991)	9
Williams v. MGM-Pathe Comm. Co., 129 F.3d 1026 (9th Cir. 1997)	5
Statutes and Rules	
15 U.S.C. § 77z-1(a)(6)	3, 4

I. The Court should grant certiorari to eliminate the manipulation of reversionary settlements to enrich class counsel at the expense of their clients.

Respondents advance no legitimate reason to deny the Petition for Writ of Certiorari. Respondents do not challenge the scheme described in the Petition, or that they engaged in each and every element of the scheme. Respondents do not deny that they embraced a reversionary settlement[1] and used it to demand a fee equal to one-third of the gross nominal settlement fund of $40,000,000, *knowing* that only a minor fraction of the class would file qualifying claims (in this case, approximately 5,000 of the 20,600 class members—or 25%—filed qualifying claims). Respondents do not deny that they *knew* their fee demand of $13,333,333 would yield a fee of more than 200% of the actual class distribution of approximately $6,500,000. That is the essence of the scheme—the misuse of reversionary settlements to enrich counsel at the expense of the class.

Whenever class counsel opt for a reversionary settlement with the intention of claiming 33⅓% of the gross nominal settlement fund in fees, they are *knowingly* sacrificing the interests of the class to obtain personal financial benefit. *It is a mathematical certainty* that any time class counsel seeks a fee of 33⅓% of a reversionary fund the requested fee will be 200% of what the class will receive. Subtracting 33⅓% from the reversionary fund for class counsel's fees leaves a maximum of 66⅔% of the fund for the class. Class counsel

---

[1] In a "reversionary" settlement attorneys' fees and costs are first deducted from the gross settlement fund. Class members who file qualifying claims receive a percentage of the remaining fund based upon the assumption—which is a fiction—that 100% of the class will file qualifying claims. The interests of all class members who do not file qualifying claims revert to the settling defendants. Typically only 25% of the class files qualifying claims; 75% of the remaining fund then reverts to the defendants. This is in contrast with a "pro rata" settlement where the entire settlement fund, after payment of class counsel's fees and expenses, is paid out to qualifying claimants. There is no reversion to the settling defendants in a pro rata settlement. Even if only 25% of the class file claims, in a pro rata settlement these qualifying claimants get the entire remaining fund.

knows that only 25% of the class will file qualifying claims. This means that only 16⅔% of the fund will be disbursed to the class (*i.e.*, 25% of 66⅔%). Thus when class counsel seeks 33⅓% of the reversionary fund, it *knowingly* seeks a fee that is twice the 16⅔% of the fund actually paid to the class.

The Eleventh Circuit stated that the district court has unfettered discretion to "bas[e] the attorneys' fee award on the actual class recovery or on the gross settlement figure", *Waters v. International Precious Metals Corp.*, 190 F.3d 1291, 1298 (11th Cir. 1999); P.App., A-13 , and went on to hold that the district court did not abuse its discretion by awarding an attorneys' fee of 33⅓% of the gross settlement figure even though that amount was twice the amount that the class would receive.

The Eleventh Circuit's approach should be rejected for a number of different reasons. *First*, the "anything goes" approach of awarding fees based upon the gross settlement amount regardless of actual class recovery results in a misallocation of settlement funds, permitting class counsel to appropriate the larger part of the amount paid in settlement.

Second, it separates the interest of class counsel from that of the class by divorcing class counsel's compensation from the actual distribution to the class. It creates a powerful incentive for class counsel to opt for the reversionary form of settlement to enrich themselves at the expense of the class.

Once a reversionary form of settlement is used, defendants acquire an interest in the claims procedure, because that procedure determines the actual distribution and the reversion. In this case, class members were required to file a proof of claim and attach all of their monthly statements for the five-year class period. While not unusual for a reversionary settlement, this claims procedure reduced the number of qualified claimants. In a pro rata case, plaintiffs' counsel can adopt an automatic payment system reaching all members of the class. That is not possible in a reversionary settlement.

Third, the Eleventh Circuit's "anything goes" approach involves the federal courts in practices which undermine public confidence in the courts. There is typically no adversary presentation in proceedings leading to the approval of class action settlements. The settlement stipulation tends to be a rather complicated document. Pressed by the demands of their docket, district court judges rarely devote more than a few hours to the fairness hearing in a class action.

Fourth, this "anything goes" approach creates an unjustifiable difference between fees awarded in pro rata and those awarded in reversionary settlements, by permitting windfall fees in reversionary settlements. In a pro rata settlement, the fee necessarily bears a reasonable relationship to actual class recovery because the entire balance of the fund, after fees, is always paid to the class. For example, a 33⅓% fee in a pro rata case results in a class distribution of 66⅔% of the settlement fund; the fee is 50% of the class's recovery. *No court would ever permit a fee of 66⅔% of a pro rata fund.*

That, however, is precisely what the court endorses in a reversionary settlement when it awards a fee of 33⅓% of the gross amount *regardless of actual class recovery*. Perpetuation of the Eleventh Circuit's approach will guarantee that class counsel will choose reversionary settlements in order to claim disproportionately high fees.

The only effective way to eliminate these abuses of class settlements is to require that counsel's fees be limited to a reasonable percentage of the amounts actually distributed to the class in any tort case involving pecuniary loss. That rule is easy to apply. It can be readily understood by the public. Most importantly, that rule will eliminate the sordid spectacle of class actions yielding more in attorneys' fees than benefits to the class. That rule has already been adopted by Congress in the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 77z-1(a)(6), and is applied in all securities class actions. There is no more reason to allow excessive attorneys' fees in a commodities action than there is in a securities action.

In any class action seeking a remedy for pecuniary loss, the amount actually distributed to the class is the definitive measure of the social value of the litigation. No public purpose is served by paying class counsel more than the amount of compensation received by the class.

Tying attorneys' fee awards to a reasonable percentage of the amounts actually distributed to the class will not unreasonably restrict the district court in awarding fair fees. The district court will be able to consider all of the special factors present in any case which warrant some higher or lower percentage of the amount received by the class.

Respondents make no effort to propose any rule, asking this Court to rubber-stamp whatever the district court decides, irrespective of the fee's relationship to the actual class benefit.

This case offers the Court a rare opportunity to eliminate these nefarious practices. Because of normally successful attempts by plaintiffs' counsel to silence defendants through clear sailing agreements, the Court is unlikely to have another such opportunity.

II. This Court should grant certiorari to resolve conflicting interpretations of *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980), which have led to conflicts below.

The decision of the Eleventh Circuit is based on its mistaken acceptance of the erroneous interpretation of *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980) urged by respondents. Respondents claim the *Boeing* decision "held that it was 'permissible' to base fees on the entirety of the fund". (Resp. at 23.) The Eleventh Circuit held that "[i]n *Boeing*, the Supreme Court rejected petitioner's argument that the attorneys' fee award could be based only on the portion of the common fund actually claimed by class members . . . ." 190 F.3d at 1294; P.App., A-6. Both are wrong. This Court did not purport to determine what fee should be paid in *Boeing*. All that *Boeing* decided was that the fee which had been awarded by the district court need not be deducted, in its

entirety, from the distributions made to claiming class members. The Court went on to say "we need not decide whether a class-action judgment that simply requires the defendant to give security against all potential claims would support a recovery of attorney's fees under the common-fund doctrine", thus expressly reserving decision as to reversionary funds. 444 U.S. at 480 n.5.

The Eleventh Circuit's opinion in this case conflicts with the opinion of the Ninth Circuit in *Williams v. MGM-Pathe Comm. Co.*, 129 F.3d 1026 (9th Cir. 1997) and the opinion of the Fifth Circuit in *Strong v. BellSouth Telecomm., Inc.*, 137 F.3d 844 (5th Cir. 1998). In this case, the Eleventh Circuit held:

> "Nothing in this opinion precludes a district court judge in a different case from basing the attorneys' fee award on the actual class recovery or on the gross settlement figure." (190 F.3d at 1298; P.App., A-13)

In *Williams*, the Ninth Circuit held:

> "We conclude that the district court abused its discretion by basing the fee on the class members' claims against the fund rather than on a percentage of the entire fund . . . ." (129 F.3d at 1027)

In the Eleventh Circuit, a district court judge can set a class counsel's fee based on the actual distribution; in the Ninth Circuit, she cannot. That's a conflict.

In this case, the Eleventh Circuit interpreted *Boeing* to "reject petitioner[s'] argument" that class action fees should be set in relation to the actual class distribution in reversionary settlements. In *Strong*, the Fifth Circuit held that *Boeing* did not apply to reversionary settlements, relying on the Supreme Court's express reservation in footnote 5 quoted above. 137 F.3d at 852 n.8. That's a conflict.

The Eleventh Circuit's permissive approach in this case has given rise to a conflict with serious practical results. In a

recent study conducted by National Economic Research Associates ("NERA") of securities class action in the federal courts and relied upon by the district court in this case, NERA concluded that attorneys' fees in securities class settlements in the Eleventh Circuit averaged 43% of the class distributions. (Pet. at 17.) Petitioners determined and placed on record two additional facts: (1) the settlement amounts in the NERA Study were all actually distributed to class members; and (2) no fee in any of those cases exceeded 50% of the actual class distribution.[2] That means that the fee awarded in this case, at over 200% of the actual distribution, was at least 400% of any fee ever awarded in the Eleventh Circuit in a securities class action settlement.

The NERA Study also concluded that average fees in the other federal circuits in securities class actions varied between 42.2% and 48.5% of class distributions. (Pet. at 4, 17.) The Eleventh Circuit's decision is thus in conflict with other circuits in its rationale and in conflict with district court decisions throughout the country in its results.

III. Respondents have offered no acceptable reasons for this Court to deny certiorari.

Respondents ask this Court to leave their exorbitant Fee Award undisturbed because they have allegedly incurred an "actual lodestar" of $12.6 million in this case. (Resp. at 20.) Respondents fail to disclose that the $12.6 million is not, in fact their actual lodestar. It is merely the result of multiplying their alleged but unexamined time expenditure by the rates which were in effect at the close of the litigation—rates which were materially higher than the actual rates during the years involved. The district court asked for no lodestar presentation and plaintiffs' counsel made none. Class counsel's guesstimate of time expenditures are notoriously unreliable. *See, e.g.,*

---

[2] *See* Pet. at 17; App. K (NERA Study, Table 12b); App. M (Aff. of Michael R. Siebecker, executed April 21, 1997) at pp. M-4, ¶ 12; M-6, ¶ 15; and P.App., p.W-40.

Goldberger v. Integrated Resources, Inc., 2000 WL 320447 (2d Cir. March 28, 2000).

The fact that plaintiffs' counsel consumed seven years in pretrial proceedings and five months in trial time provides no measure of any value conferred by this litigation. The sole reason that this case consumed such resources is that plaintiffs' counsel *admittedly demanded $90,000,000 in cash up to the day before the settlement*, even though the alleged aggregate investment loss was only $120,000,000. As the NERA Study makes clear, securities class actions are settled for 2% to 10% of the investment loss. (P.App., W-26) In this case, that would be $4,000,000 to $12,000,000. The length of this case is the direct result of plaintiffs' counsel's unreasonable insistence on a $90,000,000 settlement. At the last moment, plaintiffs' counsel settled the case for a class distribution of $6,500,000. This case could have been settled for that amount years ago.

In the Eleventh Circuit, petitioners demonstrated at length that this case should never have been certified as a class action in the first place. It is no more than a glorified churning case and churning cases have never been certified as class actions because they require proof of individualized communications between individual customers and their brokers—in this case 20,600 customers and 800+ brokers. (P.App., W-12) The district court succeeded in transforming this case into a class action only by repealing the recognized reliance requirement from the securities laws in direct contravention of controlling Eleventh Circuit precedent. (P.App., W-14 to 18) Respondents made no attempt to defend the class certification decision in the Eleventh Circuit.

It is impossible to make any reasoned assessment of the justifiability of the highly unusual fee award in this case without dealing with the fact that this case should never have been prosecuted as a class action. Whether the fee claimed is said to be justified on "percentage of fund" or "lodestar" basis, any reviewing court must make some assessment of whether the case was a proper class action, particularly where the

district court's primary justification was its mistaken view that this was a "well-conceived class action". (P.App., W-4) The Eleventh Circuit simply refused to do so, dismissing that controlling factor without any consideration: "The merits of the underlying class action, notwithstanding the energy devoted to those topics by counsel, are not at issue in this appeal." 190 F.3d at 1292 n.1; P.App., A-2 n.1. The Eleventh Circuit's summary dismissal of that issue demonstrates that the panel simply abdicated its appellate responsibilities.

Respondents claim that they should be rewarded for creating the mere "opportunity" created by the reversionary fund and relieved of responsibility for the amount actually claimed, which they dismiss as a fortuity beyond their control. Their disclaimer of responsibility should be rejected. Plaintiffs' counsel control the form of class action settlements because defendants are interested in what settlements cost, not who gets the money.

Respondents could have opted for a pro rata settlement with an automatic payout to all class members. Instead, they chose a reversionary settlement so that they could claim a fee based on the gross nominal settlement fund. They adopted a claims procedure which required class members to submit a proof of claim and copies of all their monthly statements over the five-year class period. Seventy-five percent of the settlement fund consisted of ten-year notes bearing interest at a rate of 5.5%. Respondents initially claimed all of the cash, leaving the average class member with $66 per year in interest for 10 years, on a $1,200 note. The notice so advised the class, which is one of the reasons that only 25% of the class submitted qualifying claims. After the district court denounced their behavior as "outrageous" (P.App., W-38), respondents limited their demand to $5,000,000 in cash payable immediately after approval of the settlement. As a result, the average class distribution is $40.92 per year in interest on a ten-year note and $456 in cash. As respondents demonstrated in this case, plaintiffs' counsel do control the extent to which

class members can take advantage of the "opportunity", and should be held responsible for their behavior.

Respondents seek to deflect the Court's attention from the serious policy issues raised by petitioners by arguing that petitioners' agreement not to oppose plaintiffs' fee *application in the district court bars petitioners from appellate review.* The fact that petitioners agreed to submit the fee decision to the discretion of the district court, as limited by past precedent, is obviously no reason to deprive petitioners of their right to appellate review of an abuse of discretion which transgresses these limits.

The silence extorted by class counsel from defendants through clear sailing agreements over the past years has crippled effective appellate review. Clear sailing agreements serve no legitimate public purpose. They serve only to stifle the adversarial process to protect class counsel's fees from judicial scrutiny. The few appellate courts confronted with such agreements have refused to enforce them. *See, e.g.*, *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518 (1st Cir. 1991); *Malchman v. Davis*, 761 F.2d 893 (2d Cir. 1985). Respondents' claim that petitioners bargained for and received a limitation on respondents' fee claim to 33⅓% in exchange for the clear sailing agreement is both ludicrous and false. Respondents may believe that they surrendered a significant right in foregoing a possible claim for 50% of the gross settlement fund. Petitioners do not. Respondents apparently believe that they might have received $20,000,000 (50% of $40,000,000) and the class $5,000,000 (25% of the remaining $20,000,000) but for their forbearance. Where clear sailing agreements are used to shield the kind of manipulation practiced below, they should be disregarded.

Respondents state that only one class member objected. However, the class notice never disclosed that the attorneys' fee would be twice the class recovery. If it had, there would doubtless have been numerous objections.

Unfortunately, respondents seek to deflect the Court's attention from the important issues raised by the Petition by a stream of false allegations. Respondents will not tax the Court's patience with any extended rebuttal apart from the following statements, supported by citation to the Appendix.

Petitioners never objected to any address location service which the Settlement Administrator proposed. (*See* P. App., X-33) Respondent's supporting citation makes no reference to any locator service. (*Compare* Resp. at 12 & RA-246a-2476a)

Finally, respondents' extravagant allegations about the nature of petitioners' business should be assessed in light of respondents' decision to settle the case for $6,500,000 or five cents on the dollar, on the eve of closing arguments after the district court had said that plaintiffs had "just barely" survived defendants' Rule 50 motions and expressed doubts as to whether plaintiffs had proven the scheme they had alleged. As plaintiffs' counsel told the court, they became concerned over the prospect of a "defense verdict" or "hung jury" and concluded that ". . . it's possible two weeks from now we'll have nothing for them . . . ." (P.App., W-27) As matters turned out, they had a little for the class, and a lot for themselves.

May 8, 2000

Respectfully submitted,

R. Lawrence Bonner
HOMER, BONNER &
DELGADO, P.A.
100 S.E. Second Street
Miami, FL 33131

Martin I. Kaminsky
POLLACK & KAMINSKY
114 West 47th Street
New York, NY 10036

PAUL M. DODYK
Counsel of Record
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue

Attorneys for Petitioners

ORIGINAL

Supreme Court, U.S.
FILED
MAY 2 2000
CLERK

No. 99-1560

IN THE
SUPREME COURT OF THE UNITED STATES

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, Individually and as Trustee of the Jason Grosfeld Trust, MULTIVEST REAL ESTATE, INC., S.S. MELBOURNE, INC., and THE CYPRESS GROUP, INC.,
Petitioners,
vs.
WILLIAM WATERS AND LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENTS' OPPOSITION TO MOTION OF AMICI CURIAE TO FILE BRIEF IN SUPPORT OF PETITION

C. BRANDON WISOFF
Counsel Of Record

NEIL A. GOTEINER
FARELLA BRAUN & MARTEL LLP
235 Montgomery Street
San Francisco, CA 94104
Telephone: (415) 954-4400
Facsimile: (415) 954-4480

ERIC G. LIPOFF
RARING & LIPOFF
3070 Bristol, Suite 650
Costa Mesa, CA 92626-3072
Telephone: (714) 429-2970
Facsimile: (714) 429-2971

Attorneys for Respondents

May 2, 2000

TABLE OF AUTHORITIES

FEDERAL CASES

American College of Obstetricians and Gynecologists, Pennsylvania Section v. Thornburgh,
699 F.2d 644 (3d Cir. 1983) 1

Northern Securities Co. v. United States,
191 U.S. 555 (1903) 1

Ryan v. Commodity Futures Trading Commission,
125 F.3d 1060 (7th Cir. 1997) 2,5

Strasser v. Doorley,
432 F.2d 567 (1st Cir. 1970) 1

Respondents (plaintiffs below) hereby oppose the motion of amici curiae (Lester Brickman, George Cohen, Merritt Fox, Susan Koniak and Thomas Rowe) for leave to file a brief in support of petitioners (defendants below). Rule 37.2(b) expressly states that these types of motions are "not favored." Moreover, amici curiae fail to demonstrate in their motion any of the requirements under which courts have found it proper to consider an amicus curiae brief. They have not demonstrated that they have an interest in any other case which will be affected by the decision in this case. Nor have they shown that petitioners lack competent counsel. *See, e.g., Northern Securities Co. v. United States*, 191 U.S. 555, 556 (1903) ("It does not appear that applicant is interested in any other case which will be affected by the decision of this case; as the parties are represented by competent counsel, the need of assistance cannot be assumed; and consent has not been given. Leave to file must, therefore, be denied."); *American College of Obstetricians and Gynecologists, Pennsylvania Section v. Thornburgh*, 699 F.2d 644, 645 (3d Cir. 1983) (denying motion of law professors for leave to file amici curiae brief, noting that the law professors "do not purport to represent any individual or organization with a legally cognizable interest in the subject matter at issue").

Moreover, the proposed brief submitted by amici curiae goes far beyond commenting on the legal issues raised by the petition; the brief parrots factual misrepresentations and distortions contained in petitioners' brief -- representations which were soundly rejected as "not credible" by both the District Court and the Eleventh Circuit. "[A]n amicus who argues facts should rarely be welcomed." *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970). Amici curiae's slavish adherence to these

04249\389729.1 389729

factual distortions and petitioners' themes demonstrates that they are merely being used as a shill for petitioners -- who, as noted by the Eleventh Circuit, are not seeking to benefit the class but are in reality seeking to obtain a reversion for themselves of 90 cents of every dollar they ask the Court to cut from class counsel's fee award.

Petitioners apparently hope, through the use of these amici curiae, to give "credibility" to assertions which the District Court found were "not credible" (Petitioners' Appendix at S-4) and which the Eleventh Circuit found "strained credulity." (*Id.* at A-13) Petitioners also apparently hope through the use of these amici curiae to extend the page limits to which they are entitled. As Judge Posner of the Seventh Circuit has noted, these types of amici briefs are "an abuse":

> The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made by the litigants' briefs, in effect merely extending the length of the litigant's brief. *Such amicus briefs should not allowed. They are an abuse*. The term "amicus curiae" means friend of the court, not friend of a party. [Citations omitted] We are beyond the original meaning now; an adversary role of amicus curiae has become accepted. [Citations omitted] But there are, or at least there should be, limits. [Citations omitted] An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide. [Citation omitted] Otherwise, leave to file an amicus curiae brief should be denied.

Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1060, 1063 (7th Cir. 1997) (emphasis added).

Amici's rote mimicking of petitioners' factual (not just legal) themes rejected by the District Court and the Eleventh Circuit demonstrates that their brief is a device of petitioners. In ruling on this motion, the Court should know that:

1. Respondents' counsel spoke with several of the amici curiae on April 19, 2000, just days before the amicus brief was due. Although counsel for amici curiae were then preparing this amicus brief, the amici had not yet been provided with basic information about the case, including respondents' brief from below and the amicus curiae brief filed below on behalf of respondents by the American Association of Retired Persons ("AARP"). Nor had amici even been provided with the final order of the District Court below (the order appealed from) or the District Court's findings of fact with respect to the fee award at issue. The briefs were sent to amici only after we asked amici's counsel to send them. *See* Exhibits A-C hereto.[1] One of the amici then asked us to supply him with the District Court's final order and findings of fact, which he did not receive until April 20, two business days before amici filed their brief.

2. Although amici had little time to review these very limited record materials prior to the filing of their brief, their brief simply accepts as true factual (not legal) conclusions set forth in petitioners' brief -- conclusions which were specifically rejected by the District Court as "not credible." Compare, for example, amici's assertion concerning the results of the NERA study of fee awards (Amici brief at p. 12 n. 10) with the District Court's final order rejecting petitioners' characterization of that study as

[1] Respondents' counsel also spoke with three additional law professors (from Yale, Stanford and NYU) identified by amici's counsel as additional amici in order to arrange to send them relevant material. These professors decided not to participate as amici.

being "not credible." (*See* District Court's May 8, 1997 Order in Petitioners' Appendix at S-4)

3. Petitioners' brief suggests that adopting petitioners' position will serve the interests of the class. Both the District Court and the Eleventh Circuit flatly rejected this notion noting that petitioners are seeking to obtain *for themselves*, through the reversionary feature of the settlement, 90% of any amounts that the Court cuts from class counsel's fee award. Indeed, the Eleventh Circuit found that petitioners' position "strains credulity." (*See* Eleventh Circuit's opinion in Petitioner's Appendix at A-13)

4. Amici's brief suggests without record support that class counsel somehow traded away the rights of class members in order to obtain a larger fee for themselves. The District Court and the Eleventh Circuit flatly rejected this accusation noting "that the settlement plainly is not collusive in any respect," and that it was instead "an agreement concluded after arms-length negotiations." (*See* Petitioner's Appendix at A-5, n. 4, A-17; Respondents' Appendix at 73a)

5. Amici's brief falsely suggests that the District Court did not take the actual number of claims into account in determining a reasonable fee "because it understood that a prior decision of this Court prohibited it from doing so." (*See* 2d unnumbered page of amici's motion) To the contrary, the District Court, and the Eleventh Circuit, noted that this Court's *Boeing* decision permits, but does not require, a district court to consider the gross amount of the settlement fund (and not just amounts claimed by class members from the fund) in setting an appropriate fee. (*See* Petitioners' Appendix at A-13) The District Court noted that virtually all of the relevant fee determination factors, including

the length and intensity of the litigation, the risk assumed by class counsel, the public policy that class counsel served by pursuing the owners of a telemarketing boiler room that had been shut down by the CFTC for massive sales fraud, all necessitated an upward adjustment in the benchmark fee. (Petitioners' Appendix at S-6-7; Respondents' Appendix at 93a-101a) The Eleventh Circuit also noted that the fee actually awarded represented a "modest multiplier" of barely 1.05 on class counsel's actual lodestar invested in this case through seven years of litigation and five months of jury trial. (Petitioners' Appendix at A-13) The courts below rejected the notion that class counsel after taking this enormous risk, and making this enormous investment, should be forced to suffer a multimillion dollar loss, just so petitioners could receive a reversion of 90% of the fee the District Court awarded class counsel. (Respondents' Appendix at 91a-92a) Moreover, the District Court found that the failure of class members to file claims against the fund was in large part attributable to petitioners who "engaged in litigation tactics that substantially prolonged the case." (District Court's May 8, 1997 Order in Petitioner's Appendix at S-6) As the District Court summarized: "To allow the Defendants to succeed in taking the position they advocate at this point in time would, in effect, reward them for prolonging the litigation in anticipation that the longer the litigation went on, the greater the likelihood that the number of class members who could be located and who would submit claims would decrease." (*Id.*)

6. In their zeal to side with petitioners on issues of fact, amici go so far as to suggest there was no support for class counsel's lodestar. (Amici brief at p. 4 n. 2) Even petitioners raised no serious challenge to respondents' lodestar figure submitted in the

District Court. Petitioners did, however, challenge respondents' cost bill and the District Court, therefore, ordered petitioners to disclose their own costs for sake of comparison. Those costs were 63% greater than those awarded to class counsel, strongly suggesting that amounts expended by petitioners in this seven year litigation similarly exceeded those of respondents by a substantial margin. (Respondents' Appendix at 253a-254a) The District Court also noted that petitioners had thrown "massive manpower" into this case, to the point where "as many as 30 lawyers for the defense [were] working on the case at any one point in time." (Respondents' Appendix at 70a) The District Court further noted that "for over six years a relatively small group of California lawyers had been battling a fairly large group of defense lawyers in a tenacious effort to bring this case to an conclusion in Miami, Florida." (*Id.* at 71a) Amici's efforts to dispute previously undisputed facts -- such as the amount of respondents' lodestar -- again demonstrates they are acting as friends of petitioners, not friends of the Court.

7. Amici's brief suggests that class counsel had no incentive to ensure that class members would file claims. In speculating about class counsel's psyche, amici simply ignore the actual record evidence. The District Court found that class counsel, even after preliminary approval of the settlement, continued vigorously to protect the interests of class members by, among other things, obtaining a court order requiring the settlement administrator to use an expensive address locator service to update the addresses of class members whose claim packets were returned by the postal service. (Respondents' Appendix at 46a) Petitioners had opposed these efforts in order to increase their reversion requiring the Court's intervention. Additionally, respondents are

currently fighting -- at their own expense -- another of petitioners' appeals still pending in the Eleventh Circuit, wherein petitioners are seeking to overturn a District Court order allowing certain class members' claims. (*See* Respondents' Brief at 10 & n. 4)

8. Amici's brief states that the "parties doubtless expected" that only a fraction of class members would actually file claims. (Amici Brief at 5) Again, this type of flippant mimicking by amici of petitioners' brief -- without a shred of factual support -- is as improper as it is regrettable. The actual evidence is to the contrary. (*See* Respondents' Appendix at 154a)

9. Amici's brief suggests that the $40 million settlement fund was "illusory," even though the District Court and the Eleventh Circuit rejected that notion. (*See* Petitioners' Appendix at A-9, A-12)

10. Amici's brief also parrots the refrain which petitioners have been making throughout this litigation -- namely that the District Court improperly certified a "churning" claim. (Amici Brief at 11) The mere fact that amici curiae would insert this gratuitous remark in their brief -- when it has no bearing whatsoever on the issues they raise -- tells all. More importantly, it is patently absurd based on the facts of this case. The CFTC does not seek a permanent injunction closing a commodities firm because a few salespersons are "churning" accounts; the CFTC sued petitioners' company and put it out of business because petitioners were supervising and training salespeople to cheat customers. That is why rules of the National Futures Association ("NFA") still require strict supervision of salespersons formerly associated with petitioners' company. (Respondents' Appendix at 305a-313a)

11. Amici's brief suggests that class counsel could have negotiated a better settlement for the class if they had not been looking out for their own interest. And yet, class counsel settled only after seven years of litigation and on the eve of verdict following a five-month jury trial. Even if class counsel had rejected the settlement at issue and proceeded to a plaintiffs' verdict, class members would have received nothing for years -- if at all. The District Court noted this fact in approving the settlement commenting: "That [the court] had agreed that in the event of a plaintiffs' verdict [it] would authorize the defendants to take an interlocutory appeal before proceeding with the case further, let alone to judgment, because there were additional proceedings that were necessary in order to determine whether the plaintiffs were entitled to anything at all even after this trial." (Respondents' Appendix at 69a) The District Court went on to note that because of the complexity and novelty of the issues, it would have taken "three to four years to conclude the appellate proceedings stemming from the trial and then possibly additional time, if the plaintiffs prevailed on appeal, and possibly another appeal, to resolve the remaining issues in the case and enter a judgment." (*Id.*) Unless class counsel prevailed in each of those proceedings, the class would have received nothing; and even if class counsel had prevailed in each of those proceedings, additional years would have passed leading to further dissipation of the class and a decrease in likely claims against any settlement or judgment fund. Amici's ivory tower speculation about what "could" have been done is wholly divorced from the factual findings of the District Court, thoroughly reviewed and unanimously affirmed by the Eleventh Circuit. In short, amici improperly push petitioner's factual assertions, leading them to the conclusion that

although class counsel spent seven years of litigation and millions of dollars of investment to recover millions for the class, class counsel should suffer a multimillion dollar loss for their efforts so the boiler room owner can get a reversion of 90% of the fees. Compare this outcome with amici's professed interest in "deterrence." (*See* Amici Brief at 13)

These types of bald factual assertions and innuendo detached from the record evidence have no place in a proper amicus curiae brief. Their inclusion in this brief (especially in light of the fact that amici apparently had not even begun to review the relevant briefs and record below until days before the brief was filed, and then only after respondents urged at least this minimal inquiry) strongly indicate that amici curiae are being used as a "mouthpiece" for petitioners.

Amici's further suggestion that they should be permitted to file a brief in this Court because the AARP filed an amicus brief in support of respondents below is wholly unfounded. The AARP, as the nation's largest lobby group representing the interests of older American consumers, clearly had an immediate and concrete interest in the outcome of this case that recovered millions of dollars from the owners of a telemarketing boiler room that was shut down by the CFTC after bilking consumers of virtually all their invested capital. Many of the AARP's members are members of the class. Further, the AARP did not distort or invent facts rejected by the District Court; it accepted the District Court's factual findings and made arguments concerning the law. (*See* Respondents' Appendix at 168a-199a) Moreover, that the AARP, whose mission it is to protect the types of class members involved in this case, filed an amicus brief *supporting* the fee

award strongly indicates that it is respondents, not petitioners, who have been fighting to uphold the class members' interests in this litigation. An amicus brief supporting a position different from that which the Court might initially expect is of much more significance that an amicus brief which adopts a predictable position and does nothing more than repeat the arguments in the brief of the party it supports.

For the above stated reasons, respondents respectfully request that the Court deny the motion of amici curiae for leave to file a brief in support of petitioners.

Respectfully Submitted

C. BRANDON WISOFF
Counsel Of Record

NEIL A. GOTEINER
FARELLA BRAUN & MARTEL LLP
235 Montgomery Street
San Francisco, CA 94104
Telephone: (415) 954-4400
Facsimile: (415) 954-4480

ERIC G. LIPOFF
RARING & LIPOFF
3070 Bristol, Suite 650
Costa Mesa, CA 92626-3072
Telephone: (714) 429-2970
Facsimile: (714) 429-2971

Attorneys for Respondents

CERTIFICATE OF SERVICE

This is to certify that I served a copy of the attached:

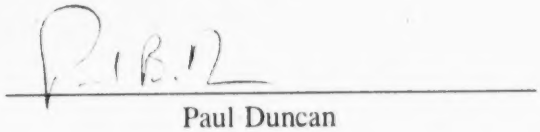
RESPONDENTS' OPPOSITION TO MOTION OF AMICI CURIAE TO FILE BRIEF IN SUPPORT OF PETITION

upon the parties listed below by causing a copy of the same to be delivered via First Class United States Mail, addressed as follows:

Paul M. Dodyk, Esq.
Cravath, Swaine & Moore
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475

Steven M. Edwards, Esq.
Hogan & Hartson, LLP
100 Park Avenue
New York, NY 10017

I certify and declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed in San Francisco, California on May 2, 2000.



Paul Duncan

HOGAN & HARTSON
L.L.P.

STEVEN M. EDWARDS
PARTNER
(212) 918-7242
SMEDWARDS@HHLAW.COM

April 18, 2000

100 PARK AVENUE
NEW YORK, NEW YORK 10017
TEL (212) 885-8000
FAX (212) 918-7200
WWW.HHLAW.COM

Neil A. Goteiner, Esq.
Farella, Braun & Martel
235 Montgomery Street
San Francisco, CA 94104

International Precious Metals v. Waters

Dear Mr. Goteiner:

As I mentioned in our telephone conversation earlier today, we are writing an amicus curiae brief on behalf of certain law professors in support of the petition. The Amici are Lester Brickman of Cardozo Law School, George Cohen of the University of Virginia Law School, Merritt Fox of the University of Michigan Law School, Joseph Grundfest of Stanford University Law School (who may drop out because of time constraints), Susan Koniak of Boston University Law School, Geoffery Miller of N.Y.U. Law School and Thomas Rowe of Duke University Law School. The Amici will essentially contend that the district court erred in awarding attorneys' fees without determining whether they bore a reasonable relationship to the recovery actually paid to the class.

Pursuant to Supreme Court Rule 37.2, we are seeking consent of Respondents to the filing of this brief. Petitioners have already consented. Rule 37.2(a) requires that such consent be in writing.

Given our time constraints, we would appreciate hearing from you by the end of the day tomorrow, April 19. If we do not hear from you by then, we will assume that consent has been withheld. At your suggestion, I am forwarding the briefs in the Eleventh Circuit to all Amici.

Sincerely yours,

Steven M. Edwards

Via Federal Express and Facsimile

FARELLA BRAUN & MARTEL LLP

ATTORNEYS AT LAW

RUSS BUILDING, 30TH FLOOR
235 MONTGOMERY STREET
SAN FRANCISCO, CA 94104

TELEPHONE: (415) 954-4400
FACSIMILE: (415) 954-4480

WINE COUNTRY OFFICE
TELEPHONE: (707) 967-4000

NEIL A. GOTEINER
DIRECT DIAL: (415) 954-4485
E-MAIL: goteinen@fbm.com

April 18, 2000

VIA FACSIMILE

Steven Edwards
Hogan & Hartson
100 Park Avenue
New York, NY 10017

Re: Waters

Dear Mr. Edwards:

Thank you for your April 18 letter. Either I or Brandon Wisoff will attempt to tell you by the end of the day tomorrow whether plaintiffs will consent to you filing your amicus brief.

Regarding contacting the amici, you admonished me today that you were "in essence" their attorney and suggested that accordingly I should not be contacting them. I asked you to confirm your attorney-client relationship in writing. You did not suggest in your April 18 letter, however, that you had any such relationship. We are therefore proceeding under the assumption that you are not in fact the attorney for any of the amici. Indeed, it seems from your most-recent silence on that point (as well as your additional comments today) that you yourself are not a true amici but are in fact allied with Mr. Grosfeld and/or his counsel in something very different than a proper amici relationship. I trust you will follow the Court's rules in making all appropriate disclosures of that relationship.

In any case, I also trust that you are sending the amici at least both class counsels' and the AARP's briefs before the Eleventh Circuit. It is startling to me that any of these "amici" could begin to state any properly informed view without having had access to this briefing and relevant parts of the underlying record.

On the off-chance, however, that you might have any duty of full disclosure to the amici, I urge you to inform all of them of the issues we discussed today regarding defendants'

assertions before the Eleventh Circuit and Supreme Court, as well as a full summary of the record that bears directly on the contention that you describe will be the amici's position before the Supreme Court.

Very truly yours,

NEIL A. GOTEINER/GMG

Neil A. Goteiner
DICTATED BUT NOT READ

NAG:gmg
04249\387124.1:387124

HOGAN & HARTSON
L.L.P.

STEVEN M. EDWARDS
PARTNER
(212) 918-7242
SMEDWARDS@HHLAW.COM

April 18, 2000

100 PARK AVENUE
NEW YORK, NEW YORK 10017
TEL (212) 685-8000
FAX (212) 916-7200
WWW.HHLAW.COM

Neil A. Goteiner, Esq.
Farella, Braun & Martel
235 Montgomery Street
San Francisco, CA 94104

International Precious Metals v. Waters

Dear Mr. Goteiner:

I write in response to your letter of April 18, 2000.

For clarity, I told you that I was "in a sense" counsel to the Amici and asked you to hold off on contacting them until I had a chance to ascertain whether they wanted to be contacted. You told me that you intended to disregard my request, so I did not think it necessary to address the issue in my letter to you yesterday. As things stand, some of the Amici are willing to talk to you and some are not interested; but rather than my stating the position of each on an individual basis, it is probably more efficient for each of them to adopt their own position if and when you call.

At your request, I have sent the Amici the briefs that were filed in the Eleventh Circuit, including the AARP's brief, and have offered to provide them any additional information they need. With respect to the innuendo in your letter concerning the propriety of my conduct, suffice it to say you are wrong. You have no basis for suggesting that (a) either I or the Amici are involved in "something very different than a proper amici relationship"; (b) there is a risk that I will not obey the Supreme Court's rules; or (c) that amici need to study the entire factual record of a case in order to take a position on a question of law.

Sincerely yours,

Steven M. Edwards

Via Facsimile

BEST AVAILABLE COPY